Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

ANR PIPELINE COMPANY and
COLORADO INTERSTATE GAS COMPANY,
Petitioners,

v.

THE STATE BOARD OF EQUALIZATION
and THE OKLAHOMA TAX COMMISSION,
Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF OKLAHOMA

PETITION FOR A WRIT OF CERTIORARI

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June 5, 1995

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TOPP

QUESTION PRESENTED

Whether, under the federal Equal Protection Clause, a state's decision to elect one method of compliance with a federal anti-discrimination statute constitutes a rationally based legitimate state interest sufficient to justify discriminatory tax treatment of similarly situated taxpayers, even though the state could elect other methods of compliance which treat similarly situated taxpayers the same.

PARTIES TO THE PROCEEDING

The following parties participated in the proceedings below and are petitioners: ANR Pipeline Company and Colorado Interstate Gas Company.[1]

DISCLOSURE STATEMENT PURSUANT TO RULE 29.1

The Coastal Corporation, through wholly owned intermediate subsidiaries, is the ultimate parent company of ANR Pipeline Company and Colorado Interstate Gas Company, neither of which has subsidiary corporations other than those wholly owned.

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[1] Additionally, the following parties were in the proceedings below: Petitioners—Williams Natural Gas Company, Williams Pipeline Company, and Williams Telecom Group; Respondents—The State Board of Equalization and The Oklahoma Tax Commission; and other Intervenors—El Paso Natural Gas Company, Transwestern Pipeline Company, Enron Oil and Gas Marketing, Black Marlin Pipeline Company, Explorer Pipeline Company, Aquila Gas Systems, Inc., Sun Pipeline Company, Mid-Continent Pipeline Company, Northern Natural Gas Company, Natural Gas Pipeline Company of America, and Western Gas Resources, Inc.

TABLE OF CONTENTS

QUESTION PRESENTED i
PARTIES TO THE PROCEEDING ii
DISCLOSURE STATEMENT PURSUANT TO RULE 29.1 ii
TABLE OF AUTHORITIES . . . . . iv-v
OPINION BELOW 1
JURISDICTION 1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2
STATEMENT 2
A. Factual Background 2
B. Proceedings Below 3
REASONS FOR GRANTING THE PETITION . . 5
CONCLUSION 15

TABLE OF AUTHORITIES

Cases	Page
Allegheny Pittsburgh Coal Co. v. Webster County, 488 U.S. 336 (1989)	5,6,9,11,14
Cumberland Coal Co. v. Board of Revision, 284 U.S. 23, 28-30 (1931)	10
Department of Revenue of Oregon v. ACF Indus., Inc., 127 L. Ed. 2d 165, 171 (1994)(citing *Western Air Lines, Inc. v. Board of Equalization*, 480 U.S. 123, 131 (1987))	6,7,11
Edelman v. Jordan, 415 U.S. 651, 671 (1974)	12
F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)	9
Federal Express Corp. v. Tennessee State Bd. of Equalization, 717 S.W.2d 873 (Tenn. 1986)	6
Hooper v. Bernalillo County Assessor, 472 U.S. 612, 618 (1985)	9
In re ANR Pipeline Co., 866 P.2d 1060 (Kan.), *cert. denied*, 115 S. Ct. 296 (1994)	6
Jackson Water Works, Inc. v. Public Utilities Comm'n, 793 F.2d 1090 (9th Cir.), *cert. denied*, 479 U.S. 1102 (1986)	12
Jimenez v. Weinberger, 417 U.S. 628, 636-38 (1974)	13
Kennecott Corp. v. Utah State Tax Comm'n, 858 P.2d 1381 (Utah 1993)	6
Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 359 (1973)	9
Mathews v. Lucas, 427 U.S. 495, 510 (1967)	9

Cases	Pages
Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869 (1985)	9
Nordlinger v. Hahn, 120 L. Ed. 2d 1 (1992)	5,6,9,12
Northern Natural Gas Co. v. State Bd. of Equalization & Assessment, 443 N.W.2d 249 (Neb. 1989), *cert. denied*, 493 U.S. 1078 (1990)	5,7,8
Rinaldi v. Yeager, 384 U.S. 305, 308 (1966)	13
Shapiro v. Thompson, 394 U.S. 618, 641 (1969), overruled in part on other grounds, *Edelman v. Jordan*, 415 U.S. 651, 671 (1974)	7,12
Sioux City Bridge Co. v. Dakota County, 260 U.S. 441 (1923)	7
State v. Colonial Pipeline Co., 471 So. 2d 408 (Ala. Civ. App. 1984)	6
Western Air Lines, Inc. v. Board of Equalization, 480 U.S. 123,131 (1987)	7
Western & Southern Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 668 (1981)	12
Williams v. Vermont, 472 U.S. 14 (1985)	9,13
Zobel v. Williams, 457 U.S. 55 (1982)	9

STATUTES

49 U.S.C. § 1513 (recodified at 49 U.S.C. § 04116 (1994)) 2,3,11

49 U.S.C. § 11503 (1988) 2,3

49 U.S.C. § 11503(b) 11

Okla. Const. art. X, § 8 14

Okla. Stat. Ann. tit. 68, § 2808 (West 1992) 2

Okla. Stat. Ann. tit. 68, § 2864(C) (West 1992) . . 2,3

U.S. Const. amend. XIV, § 1 2,9

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Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF OKLAHOMA

PETITION FOR A WRIT OF CERTIORARI

Petitioners ANR Pipeline Company and Colorado Interstate Gas Company hereby petition for a writ of certiorari to review the judgment of the Supreme Court of the State of Oklahoma in this case.

OPINION BELOW

The Supreme Court of the State of Oklahoma assumed original jurisdiction in this case. That opinion is reported at 891 P.2d 1219 and is included in the Appendix beginning at p. A-1.

JURISDICTION

The decision of the Oklahoma Supreme Court was entered on December 20, 1994. Rehearing was denied on March 7,

1995. App. beginning at p. B-1. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

The Railroad Revitalization and Regulatory Reform Act, 49 U.S.C. § 11503 (1988), is included in the Appendix beginning at p. C-1 .

The Tax Equity and Fiscal Responsibility Act, 49 U.S.C. § 1513 (recodified at 49 U.S.C. § 40116 (1994)), is included in the Appendix beginning at p. D -1.

The relevant section of the Oklahoma Ad Valorem Tax Code, Okla. Stat. Ann. tit. 68, § 2864(C) (West 1992), is included in the Appendix beginning at p. E-1 .

STATEMENT

A. Factual Background

Railroad carriers, air carriers and interstate natural gas pipelines are all interstate common carriers which transport goods for hire. Historically, the Oklahoma Ad Valorem Tax Code has classified railroad carriers, air carriers and natural gas pipelines as public service corporations and assessed all three in the same manner. Okla. Stat. Ann. tit. 68, § 2808 (West 1992). The Oklahoma Supreme Court recognized that all three have been similarly situated. App. at p. A-9 . Indeed, railroad carriers transport fuels, such as coal and propane, which compete with natural gas. Yet, for tax year 1994, pipeline property was assessed in Oklahoma at a ratio of 22.85% while railroad and

air carrier property was assessed at a ratio of only 12.08%. App. at p. A-7.

Congress has passed two acts which are designed to prevent tax discrimination against interstate common carriers. The Railroad Revitalization and Regulatory Reform Act, 49 U.S.C. § 11503 (the "4-R Act"), prevents a state from taxing interstate railroad carriers more than that state taxes other commercial and industrial property. The Tax Equity and Reform Act, 49 U.S.C. § 1513 ("TEFRA"), prevents a state from taxing interstate air carriers more than that state taxes other commercial and industrial property. The 4-R Act and TEFRA both provide that certain discriminatory taxation acts against interstate common carriers "unreasonably burden and discriminate against interstate commerce."

In response to these two federal acts, the Oklahoma legislature passed the following statute:

> In determining the assessment ratio for all air carrier property and all railroad property, the State Board shall only consider the ratio of the aggregate assessed value of the fair cash value of the locally assessed commercial/industrial real property of the state.

Okla. Stat. Ann. tit. 68, § 2864(C). The Oklahoma Supreme Court's interpretation of this section was that it created a separate property tax classification for railroad carriers and air carriers, but not for pipelines. App. at p. A-9. As a result, railroad carriers and air carriers are to be spared from burdensome tax discrimination, but interstate pipelines are not.

B. Proceedings Below

Petitioners challenged in the Court of Tax Review their property tax assessments by the State Board of Equalization for tax year 1994, seeking to have their assessment ratios lowered to that ratio applied to railroad carriers and air carriers. Petitioners argued that the lower assessment ratios given to railroad

carriers and air carriers, but not given to pipelines, violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Three public service companies brought a similar 1994 tax challenge before the Oklahoma Supreme Court on an Application to Assume Original Jurisdiction and Petition for Writ of Prohibition and Petitioners intervened. The Oklahoma Supreme Court assumed original jurisdiction and concluded that in response to the two federal acts, the Oklahoma legislature had created a separate subclass for railroad carriers and air carriers within the public service corporation tax classification. App. at. p. A-9. The state was permitted to give the lower assessment rate to railroad carriers and air carriers which was not given to other similarly situated public service corporations such as natural gas pipelines. The Writ of Prohibition was denied. App. at p. A-13.

The Oklahoma Supreme Court stated that because pipelines are "outside the protection afforded by Congress" that they are "no longer similarly situated to airlines and railroads." App. at p. A-9. The court held that the state legislature's compliance with the federal laws by creating a separate classification for railroad carriers and air carriers rationally furthered a legitimate state interest. App. at p. A-10. The Oklahoma court treated the federal anti-discrimination laws as a justification for tax discrimination against pipelines, resulting in its holding that there was no equal protection violation. App. at p. A-10. The Oklahoma court summarily concluded, without analysis of the elements of the applicable legal test and without citing to any supportive United States Supreme Court precedent, that a federal anti-discrimination statute can justify discriminatory treatment among otherwise similarly situated taxpayers even though the state could elect other methods of compliance which treat similarly situated taxpayers the same.

REASONS FOR GRANTING THE PETITION

The decision of the Oklahoma Supreme Court raises a significant question of federal law: Whether federal statutes designed to prevent tax discrimination can operate as an excuse under principles of the Equal Protection Clause for affirmative tax discrimination by a state. More particularly, may a state's voluntary election of one method of compliance with a federal statute permit a state to discriminate against similarly situated taxpayers even though the state could elect another method of compliance that treats similarly situated taxpayers the same?

In the instant case, the Oklahoma Supreme Court decision conflicts with both a decision of the Nebraska Supreme Court and with the decisions of this Court. The Oklahoma court's ruling conflicts with the Nebraska Supreme Court's ruling in *Northern Natural Gas Co. v. State Bd. of Equalization & Assessment*, 443 N.W.2d 249 (Neb. 1989), *cert. denied*, 493 U.S. 1078 (1990). The Nebraska court addressed the question of whether the 4-R Act justified discriminatory taxation among similarly situated taxpayers. The Nebraska court ruled that despite the federal statute, the Equal Protection Clause was violated when similarly situated taxpayers were not treated the same. In contrast, the Oklahoma Supreme Court held that because of the 4-R Act, railroad carriers and pipelines are no longer similarly situated. The Nebraska Court's decision is in compliance with both the 4-R Act and with the Equal Protection Clause. The Oklahoma Court's decision, however, complies with only the federal statutes, but not with the federal constitu-

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[2] *In re ANR Pipeline Co.*, 866 P.2d 1060 (Kan.), *cert. denied*, 115 S. Ct. 296 (1994); *Kennecott Corp. v. Utah State Tax Comm'n*, 858 P.2d 1381 (Utah 1993); *Federal Express Corp. v. Tennessee State Bd. of Equalization*, 717 S.W.2d 873 (Tenn. 1986); *State v. Colonial Pipeline Co.*, 471 So. 2d 408 (Ala. Civ. App. 1984). To the extent that these cases held that the 4-R Act mandates separate tax classification, it appears they have been impliedly overruled by this Court's decision in *Department of Revenue of Oregon v. ACF Indus., Inc.*, which strictly construed the 4-R Act and limited its pre-emptive effect to its express language. 127 L. Ed 2d 165, 176 (1994).

tion. For this reason, the Oklahoma court's decision is worthy of this Court's review. A more detailed discussion of the state court conflict is set forth in Part I, *infra*.

The Oklahoma Supreme Court's ruling also conflicts with the Equal Protection principles outlined by this Court in *Nordlinger v. Hahn*, 120 L. Ed. 2d 1 (1992), and *Allegheny Pittsburgh Coal Co. v. Webster County*, 488 U.S. 336 (1989). *Allegheny* holds that taxpayers placed in the same tax classification may not, under the Equal Protection Clause, be arbitrarily singled out for discriminatory treatment not imposed on others in the same tax classification. *Nordlinger* takes this principle further, providing that, regardless of whether the state has chosen to place taxpayers in the same classification or not, there must be a rationally based legitimate state interest for treating similarly situated taxpayers differently. Oklahoma's court ruled, without discussion of relevant precedent from this Court, that the federal anti-discrimination laws constituted such a rationally based legitimate state interest justifying discrimination against pipelines. In short, the 4-R Act and TEFRA, statutes designed to prevent tax discrimination, were treated by the Oklahoma court as permission to discriminate against some interstate common carriers while affording favorable tax treatment to other interstate common carriers. Thus, the Oklahoma decision conflicts with the Equal Protection principles set out by this Court and is worthy of review. A more detailed discussion of the conflict with this Court's decisions is set forth in Part II, *infra*.

Finally, this Court should consider this Petition because several states other than Oklahoma have rendered similar decisions interpreting the breadth of federal anti-discrimination statutes and have used such statutes as justification for discrimi-

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[3] As a result of three federal district court decisions, the Nebraska tax officials were required under the 4-R Act to reduce the taxes of railroad property to match the levels of other commercial and industrial property.

natory state tax practices. The courts of Kansas, Utah, Tennessee and Alabama have all interpreted either TEFRA or the 4-R Act to permit burdensome taxation of public service corporations other than railroads and airlines.[2] Like other interstate common carriers, pipelines are "easy prey for State and local tax assessors in that they are nonvoting, often nonresident targets for local taxation, who cannot easily remove themselves from the locality." *Department of Revenue of Oregon v. ACF Indus., Inc.*, 127 L. Ed. 2d 165, 171 (1994)(citing *Western Air Lines, Inc. v. Board of Equalization*, 480 U.S. 123, 131 (1987)). Hence, because such interpretation of the federal statutes runs afoul of the Equal Protection Clause and results in widespread tax discrimination by states, this Court should render a definitive ruling to guide the states as to the constitutionally permissible effect of such federal statutes.

I.

The Oklahoma court's decision is inconsistent with the Nebraska Supreme Court's holding in *Northern*. The *Northern* court held that even though the state taxing officials were "acting involuntarily and under compulsion of federal law," by taxing a pipeline differently from railroads, the state had denied "equal protection of the law contrary to the 14th amendment to the U.S. Constitution."[3] 443 N.W.2d at 255. In considering the cases interpreting the effect of the 4-R Act on Nebraska's property tax scheme, the Nebraska court did not find that the federal act created or was justification for creating separate tax classifications. Several pipelines had challenged the state tax commissioner's provision of favorable tax treatment to railroads. The Nebraska Supreme Court relied upon *Sioux City Bridge Co. v. Dakota County*. 260 U.S. 441 (1923), in holding that failure to treat the property of railroads and pipelines in the same manner violated the Equal Protection Clause. *Northern*, 443 N.W.2d at 256. This Court stated in *Sioux City*:

> The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, *whether occasioned by express terms of a statute* or by its improper execution through duly constituted agents.

260 U.S. at 445 (emphasis added). Therefore, even though the Oklahoma Legislature professed to be acting under compulsion of the federal laws, the discriminatory tax treatment still constituted an equal protection violation.

The Oklahoma court tried to distinguish *Northern* by explaining that Oklahoma "enjoys a different system of taxation" because the Oklahoma legislature has the power to establish different tax classes. App. at. p. A-11. This is a distinction without a legal difference. The Nebraska Constitution required that all tangible property, except for motor vehicles, was to be taxed uniformly. Thus, all pipeline and railroad tangible property was in the same tax class with most other tangible property. It makes no difference if the state constitution places tangible property in one tax class or if the state legislature places all public service corporation property in one tax class — either way pipelines are in the same tax class as railroad carriers and air carriers and are entitled to equal treatment. More importantly, and despite state designated classifications, interstate pipelines, railroad carriers and air carriers are similarly situated taxpayers. For example, interstate pipelines and railroad carriers transport competitive fuels in interstate commerce. Under the Equal Protection Clause they should be treated the same.

II.

The Equal Protection Clause of the United States Constitution provides:

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1. This Court stated the test under the Equal Protection Clause for constitutionality of tax classifications in *Nordlinger*. In order to pass constitutional muster, disparate tax treatment among similarly situated taxpayers must "rationally further a legitimate state interest" and cannot be "arbitrary or irrational." 120 L. Ed. 2d at 13. The Equal Protection Clause "does not forbid classifications, but simply keeps governmental decisionmakers from treating differently persons who are in all relevant aspects alike." *Id.* at 12 (citing *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)). The standard of review for challenges to state taxing regimes under the Equal Protection Clause is properly deferential and the states have "great leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation." *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359 (1973). Deference, however, is not the same as abdication, and scrutiny under the "rationally based legitimate state interest" standard is still scrutiny. *Mathews v. Lucas*, 427 U.S. 495, 510 (1967)(rational basis standard is not toothless); *Nordlinger*, 120 L. Ed. 2d at 25-26 (Stevens, J., dissenting). This Court has on several occasions invalidated tax schemes under such a standard of review. *See, e.g., Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 618 (1985); *Williams v. Vermont*, 472 U.S. 14 (1985); *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1985); *Zobel v. Williams*, 457 U.S. 55 (1982). When the "alikeness" of similarly situated taxpayers is reaffirmed by the state legislators placing them in the same tax classification, the constitutional directive to treat them the same is even stronger. *See, Allegheny Pittsburgh Coal Co.*, 488 U.S.

at 343-45; *Cumberland Coal Co. v. Board of Revision*, 284 U.S. 23, 28-30 (1931). The Oklahoma Supreme Court's conclusion cannot pass these well-established constitutional tests.

The court opined that the Oklahoma Legislature's "compliance" with the 4-R Act and TEFRA by enacting Section 2864(C) of the Oklahoma statues, which the court interpreted as creating a new tax sublclass, was enough of a rationally based legitimate state interest to avoid an Equal Protection Clause violation. Yet, the 4-R Act and TEFRA do not contain any language of classification. These acts do not attempt to tell the states how to classify or give direction on how to manage their property tax systems. These acts do not even tell the states how to tax railroad carriers and air carriers; these acts only prevent states from taxing railroad carriers and air carriers more than they tax commercial and industrial property. The 4-R Act provides in relevant part:

> The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a State or subdivision may not do any of them:
>
> (1) assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value other commercial and industrial property has to the true market value of the other commercial and industrial property.
>
> (2) levy or collect a tax on an assessment that may not be made under clause (1) of this subsection.
>
> (3) levy or collect an ad valorem property tax on rail transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

49 U.S.C. § 11503(b). Similarly, TEFRA provides in relevant part:

> (1) The following acts unreasonably burden and discriminate against interstate commerce and a State . . . may not do any of them:
>
> . . .
>
> (c) levy or collect an ad valorem property tax on air carrier transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

49 U.S.C. § 1513. The two federal acts serve as a guideline or measuring stick as to which taxing acts are discriminatory against interstate common carriers under the anti-discrimination principles of the federal Commerce Clause. *See, Department of Revenue of Oregon v. ACF Indus., Inc.*, 127 L. Ed. 2d 165, 173 (1994). Significantly, the federal Equal Protection Clause is founded in anti-discrimination principles paralleling those of the Commerce Clause. This basic premise that similarly situated taxpayers, such as interstate common carriers, should be treated the same is consistent with the philosophies of both the Equal Protection and Commerce Clauses, as well as the goals of the 4-R Act and TEFRA in preventing tax discrimination against interstate common carriers.

The Oklahoma Supreme Court's holding, however, is inconsistent with these anti-discrimination proclamations. The Oklahoma decision was rendered with knowledge that railroad carriers, air carriers and other commercial and industrial property owners' ad valorem taxes are to be assessed at a ratio of 12.08% of the property value while pipelines' ad valorem taxes are to be assessed at a ratio of 22.85% of the property value. The Oklahoma court recognized that under the rule of *Allegheny*, if the state legislature has left the pipelines within the same tax class as railroad carriers and air carriers, "the difference in the assessment percentages cannot withstand scrutiny under the

Equal Protection Clause." App. at p. A-8. . The Oklahoma court also admitted that absent the federal statutes, pipelines are similarly situated with railroads and air carriers. App. at. p. A-9. The only excuse, under the Oklahoma court's ruling, for separately classifying railroad carriers and air carriers from pipelines, and thereby imposing discriminatory taxes upon pipelines, is the existence of two federal anti-discrimination statutes. These federal statutes cannot be read in isolation from the broader U.S. Constitutional mandate that calls upon the states to comply with equal protection guarantees. "Congress may not authorize the States to violate the Equal Protection Clause." *Shapiro v. Thompson*, 394 U.S. 618, 641 (1969), *overruled in part on other grounds*, *Edelman v. Jordan*, 415 U.S. 651, 671 (1974). There is something intuitively wrong and patently illogical in an analysis which uses compliance with an anti-discrimination statute as the justification for discrimination, especially where other methods of compliance are available.

There are two distinct prongs to the *Nordlinger* test: first, the discriminatory treatment must further a *legitimate* state interest; and second, the classification must *rationally* relate to that legitimate state interest. *Western & Southern Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 668 (1981); *Jackson Water Works, Inc. v. Public Utilities Comm'n*, 793 F.2d 1090 (9th Cir.), *cert. denied*, 479 U.S. 1102 (1986). The discriminatory treatment of pipelines in Oklahoma does not meet either prong of the test. There is no doubt that compliance with a federal statute is a legitimate state interest, however, such compliance must not at the same time violate the federal constitution.

The new subclass created in Oklahoma does not further an interest in compliance with federal law, it simply violates the Equal Protection Clause. If the state truly wished to further its interest in complying with the federal statutes, it could have chosen two other methods which do not violate the Equal Protection Clause. First, it could have lowered the assessment

ratio for interstate pipelines, along with railroad carriers and air carriers, to match that of commercial and industrial property. Second, it could have raised the assessment ratio for commercial and industrial property to match that of the interstate pipelines, railroad carriers and air carriers. The expressed interest is not furthered, however, by discrimination among similarly situated taxpayers. An interest which violates the United States Constitution can hardly be defined as "legitimate."

The only interest furthered by the separate classification of railroad carriers and air carriers is the state's interest in maintaining its tax discrimination against pipelines. The Oklahoma legislature has not in the past recognized any pre-existing differences among pipelines, railroad carriers and air carriers for ad valorem tax purposes. A classification must find justification outside itself; it must reflect pre-existing differences and cannot create new ones that are supported by only their own bootstraps. *Williams v. Vermont*, 472 U.S. at 27. The Equal Protection Clause requires more of a state law than nondiscriminatory application within the class it establishes. *Rinaldi v. Yeager*, 384 U.S. 305, 308 (1966). Oklahoma must do more than arbitrarily create a separate class for railroad carriers and air carriers to deflect an equal protection challenge.

Also, the classification must rationally relate to the legitimate state interest by displaying some "fit" between the disparate treatment and the legislative purpose. Although the fit must not be made with mathematical precision, failure to include within a class those similarly situated may be so severe that it cannot be said that the legislative distinction "rationally furthers the posited state interest." *Jimenez v. Weinberger*, 417 U.S. 628, 636-38 (1974). The Oklahoma court failed to address how the expressed "compliance" is rationally related to a legitimate state interest when the state action taken was not even required by the federal laws. The federal laws only require that the state refrain from taxing railroad carriers and air carriers more than commer-

cial and industrial property; they do not require separate classification. They do not require continued discrimination against other interstate common carriers. Oklahoma's classification does not "fit" the stated goal of compliance with the 4-R Act and TEFRA.

Additionally, despite the Oklahoma Supreme Court's interpretation of it, even the plain language of Section 2864(C) does not compel separate classification. Like the 4-R Act and TEFRA, it simply directs the state to refrain from taxing railroad carriers and air carriers more than commercial and industrial property. The Oklahoma Constitution permits broad discretion in choosing assessment ratios, allowing a range of 0-35%. Okla. Const. art. X, § 8. The Oklahoma taxing officials could have complied with the 4-R Act, TEFRA and state law without creation of a tax subclass simply by ending discriminatory taxation against all similarly situated public service corporations and taxing all of them no more than the commercial and industrial property owners. The contrived explanation that the federal statutes required reclassification of railroad carriers and air carriers is not only inaccurate, it is also not rational to use anti-discrimination statutes as the foundation for discrimination.

Oklahoma's ill-conceived attempt at "compliance" with federal law defies logic, and is no more than an excuse for continued discrimination. It does not alter the fact that railroad carriers, air carriers and pipelines have all been placed in the same tax classification of public service corporations, and under *Allegheny Pittsburgh Coal Co.*, must be taxed uniformly. It is important that this Court review the effect of the 4-R Act and TEFRA on equal protection principles; the trend in Oklahoma and a few other states is to use these statutes as justification for singling out certain interstate common carriers to bear a vastly disproportionate tax burden.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 5, 1995

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Appendix A

No. 84,097

In the Supreme Court of the State of Oklahoma

WILLIAMS NATURAL GAS COMPANY,
WILLIAMS PIPE LINE COMPANY and
WILLIAMS TELECOM GROUP,

Petitioners,

v.

THE STATE BOARD OF EQUALIZATION
and THE OKLAHOMA TAX COMMISSION,

Respondents.

APPLICATION TO ASSUME ORIGINAL JURISDICTION
AND PETITION FOR WRIT OF PROHIBITION

Public service corporations filed original action to protest difference in ad valorem tax ratio applied to them and ratio applied to airlines and railroads.

Filed Dec. 20, 1994

**ORIGINAL JURISDICTION ASSUMED;
PETITION FOR WRIT OF PROHIBITION DENIED.**

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and

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HODGES, C.J.

Three public service corporations, Williams Natural Gas Company, Williams Pipe Line Company, and Williams Telecom Group (Williams Companies) ask this Court to assume original jurisdiction. They request a writ prohibiting the State Board of Equalization (Board) from assessing their public service property at a greater ratio than that applied to public service property owned by railroads and airlines. Original jurisdiction is assumed and the petition for a writ of prohibition is denied.

The Williams Companies assert that the assessment of their property at a ratio higher than that used to assess railroad and airline property is unlawfully discriminatory. They have challenged the Board's assessment in the Court of Tax Review. There are seventy to ninety other challenges pending in that court. All were brought by public service corporations seeking to have their assessment ratio lowered to the ratio applied to railroad and airline companies.

The Board has responded through the Attorney General to the Williams Companies' application to this Court to assume original jurisdiction. The Oklahoma Tax Commission has adopted that response. Motions to intervene have been granted to the State School Board Association, the Association of County Commissioners, several pipeline companies with cases pending before the Court of Tax Review, the Oklahoma City Public Schools, and Public Service Company of Oklahoma. Oral arguments were heard on this matter on October 19, 1994.

ORIGINAL JURISDICTION

The Williams Companies, the Board, the School Board Association, and the Oklahoma City Schools ask this Court to assume original jurisdiction on the basis of *publici juris*. They point to the many other challenges pending in the Court of Tax Review which raise the issues presented by this original action. They urge resolution of the "pure questions of law" raised in this

action which must ultimately be determined by this Court. Further, they point out that if the matter is not resolved before April 1, 1995, when the ad valorem taxes are due, the taxes will be paid under protest. Those funds will then be placed in an escrow account and will be unavailable to schools and county governments.

Every recipient of ad valorem tax revenue is potentially impacted by this action. These include common schools (K-12), vocational technical education, county government, county health departments, emergency medical service districts, solid waste management districts, county and city/county libraries, and cities (sinking funds only). The projected revenue shortfall for these institutions is $63.8 million. This represents 6.8% of total property tax revenue.

This Court has assumed original jurisdiction pursuant to the doctrine of *publici juris* to address ad valorem tax issues emanating from the Board. *See State ex rel. Poulos v. State Bd. of Equalization*, 646 P.2d 1269 (1982); *State ex rel. Poulos v. State Bd. of Equalization*, 552 P.2d 1134 (1975). The public importance of the issues presented by this action are heightened by the adverse impact on school districts and county government if the controversy is not rapidly resolved. In addition, judicial economy will be served by today's resolution of the central issues in numerous ad valorem tax protests. Original jurisdiction is therefore assumed to address the issues raised by the Williams Companies.

BACKGROUND

In Oklahoma's Ad Valorem Tax Code, the Legislature has listed three classes of property: 1) real property; 2) personal property; and 3) public service corporation property. Okla. Stat. tit. 68, § 2803(A) (1991). Real and personal property are assessed locally by county officials. The Board, however, is "responsible for valuation of railroad, airline and public service

corporation property and the adjustment and equalization of all property values both centrally and locally assessed." *Id.* at § 2802(26). The Board assesses ad valorem taxes on public service corporations by 1) establishing a fair cash value for property and 2) fixing an assessment percentage for property. The second step is challenged in this action.

During the 1960s and 1970s, Congress became concerned about the number of failing railroads. *See Chrysler Rail Transp. Corp. v. Holt*, 845 F. Supp. 463, 465 (W.D. Mich. 1994). Congress found that the states had been forcing railroads to carry more than their share of the tax burden. To prevent discriminatory taxation of railroad property by the states, Congress enacted the Railroad Revitalization and Regulatory Reform Act of 1976 (4-R Act), 49 U.S.C. § 11503 (1988). The Act provides in part:

> The following acts *unreasonably burden and discriminate against interstate commerce,* and a State, subdivision of a State, or authority acting for a State or subdivision may not do any of them:
>
> (1) assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value other commercial and industrial property has to the true market value of the other commercial and industrial property.
>
> (2) levy or collect a tax on an assessment that may not be made under clause (1) of this subsection.
>
> (3) levy or collect an ad valorem property tax on rail transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

Id. at § 11503(b)(emphasis added).

Tax discrimination against airline property which burdens interstate commerce was similarly remedied under provisions of

the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), 49 U.S.C. § 1513 (1988). That Act provides in part:

> (1) The following acts unreasonably burden and discriminate against interstate commerce and a State . . . may not do any of them:
>
> . . . .
>
> (c) levy or collect an ad valorem property tax on air carrier transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

Id. at § 1513(d)(1)(c).

In response to these federal acts, the Oklahoma Legislature enacted section 2864(C) of title 68. That section provides that "[i]n determining the assessment ratio for all air carrier property and all railroad property, the State Board shall only consider the ratio of the aggregate assessed value of the fair cash value of the locally assessed commercial/industrial real property of the state."

In June of this year, the Board adopted an assessment ratio of 12.08% for airline and railroad property. In July, the Board adopted a ratio of 22.85% for the Williams Companies and other public service corporations.

The Williams Companies claim the assessments 1) violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, 2) violate article X, section 5 of the Oklahoma Constitution which requires uniform taxation within a tax class, and 3) violate sections 2803(C) and 2847 of the Ad Valorem Tax Code, Okla. Stat. tit. 68, §§ 2801-3152 (1991), which require uniform treatment in ad valorem taxation.

EQUAL PROTECTION

The Williams Companies assert that the Board's assessments violate the Equal Protection Clause of the Fourteenth

Amendment to the United States Constitution because their property subjects them to a higher assessment percentage than the assessment percentage applied to the property of airlines and railroads. Thus, they argue, their property has been subjected to discriminatory treatment. The Board responds that the Legislature has created a subclass of property for ad valorem taxation purposes of public service corporations, the railroad and airline companies, in response to the federal legislation.

The Equal Protection Clause of the Fourteenth Amendment requires that no state "deny to any person within its jurisdiction the equal protection of the laws." State legislatures are given "especially broad latitude in creating classifications and distinctions in tax statutes." *Regan v. Washington*, 461 U.S. 540, 547 (1983). Unless a classification "jeopardizes exercise of a fundamental right" or it "characterizes based upon an inherently suspect characteristic," the Equal Protection Clause requires only that the classification "rationally further a legitimate state interest." *Nordlinger v. Hahn*, 112 S. Ct. 2326, 2332 (1992) (citing *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439-441 (1985); *New Orleans v. Duke*, 427 U.S. 297, 303 (1976)). "This standard is especially deferential in the context of classifications made by complex tax laws." *Id.*

The present controversy, however, raises the threshold issue of whether a classification has occurred. If the Legislature has made railroads and airlines a subclass of public service corporations, that is permissible provided that "the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary." *Id.* If, on the other hand, the Legislature has left the Williams Companies and other public service corporations within the same tax class, the difference in the assessment percentages cannot withstand scrutiny under the Equal Protection Clause. *See, e.g., Allegheny Pittsburgh Coal Co. v. Webster County,* 488 U.S. 336, 345 (1989) ("The equal protection clause . . . protects the individual from state action

which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class." *Hillsborough v. Cromwell,* 326 U.S. 620, 623 (1946)).

The Williams Companies argue that the Legislature has not created a separate tax class or subclass for railroads and airlines because it did not amend section 2803. That section lists only three ad valorem tax classes. However, it is the intent of the Legislature to create a tax class that controls rather than the statutory format it chooses.

Section 2864(C) provides a different taxing method for a clearly defined subclass of public service corporations, the railroads and airlines. No longer are other public service corporations of the same class. They are outside the protection afforded by Congress and are no longer similarly situated to airlines and railroads. The fact that the Legislature chose to include the provision in section 2864 rather than section 2803 does not change that. Just as the Legislature made public service corporation property a subset of the larger set of commercial and industrial property, it made railroad and airline property a subset of public service corporation property.

The Legislature was required to recognize the supremacy of federal law. It responded by creating a subclass for railroads and airlines. This is not a situation where federal law has preempted a state statute due to a conflict. The Oklahoma Legislature responded to the federal act by amending the ad valorem tax scheme so that it would not conflict with federal law.

There is nothing arbitrary or irrational in that classification. It is limited to those protected by the federal acts. The Legislature's method of creating the class was consistent with the "large leeway" states are given "in making classifications and drawing lines which in their judgment produce reasonable systems of taxation." *Lehnhausen v. Lake Shore Auto Parts Co.,* 410 U.S. 356, 359 (1973).

The classification furthers a legitimate state interest. The Legislature enacted section 2864(C) to bring Oklahoma's ad valorem taxing scheme into compliance with federal laws which gave special protection to railroads and airlines. Compliance with federal law achieved by legislative creation of a tax subclass does not violate the Equal Protection Clause.

The parties have cited four state court decisions which have addressed equal protection and uniformity of taxation issues in this context. The Williams Companies rely upon *Northern Natural Gas Co. v. State Board of Equalization and Assessment*, 433 N.W. 2d 249 (Neb. 1989) cert. denied, 493 U.S. 1078 (1990). There, a pipeline company sought to have its property assessment equalized with railroads. On appeal from the State Board of Equalization and Assessment the Supreme Court of Nebraska found the decision denied equal protection to the pipeline company. It held:

> The State Board of Equalization and Assessment, by not taxing the personal property of certain property in a class, although acting involuntarily and under compulsion of federal law, nevertheless, by complying with that mandate, has denied another taxpayer *in that same class* the equal protection of the law contrary to the 14th amendment to the Constitution of the United States.

Id. at 251 (Syllabus by the Court n.8)(emphasis added).

The key distinction between the facts of that case and the present one is that the Nebraska Board treated taxpayers of the same class differently. The Nebraska Constitution requires that "[t]axes shall be levied by valuation uniformly and proportionately upon all tangible property . . . ." Neb. Const. art. VIII, § 1. Essentially, the Nebraska taxing scheme treats *all* tangible property as being within the same class unless certain property, such as motor vehicles and agricultural land, has been exempted. Thus, when a federal court enjoined the state of Nebraska from

assessing the personal property of railroads, the result was that the assessments upon others within the class became disproportionately higher. 443 N.W.2d at 256.

When the Nebraska Supreme Court ordered that pipelines be given the same exemption as railroads, it created a revenue crisis. The Nebraska Legislature responded by making the personal property of railroads "a separate and distinct class of property and exempt[ed] the class from property taxation . . . . "*See* Neb. Rev. Stat. § 77.202.47 (4) (1990).

Oklahoma enjoys a different system of taxation. Our Constitution permits the Legislature to establish different tax classes in which property can be valued differently. *See* Okla. Const. art. X § 22. Airlines and railroads are in a legislatively created subclass of public service corporation property. This factual distinction brings this case under the persuasive authority of cases cited by the Oklahoma Board. *See In re ANR Pipeline Co.* 866 P.2d 1060 (Kan. 1994), *cert. denied*, 115 S. Ct. 296 (1994). *See also State v. Colonial Pipeline Co.*, 471 So. 2d 408 (Ala. Civ. App. 1984); *Federal Express Corp. v. Tennessee State Board of Equalization*, 717 S.W.2d 873 (Tenn. 1986). Those cases held that legislative tax classifications of railroads and airlines on one hand and other entities on the other hand, did not violate the Equal Protection Clause.

Specifically, the Kansas Supreme Court in *ANR* rejected a pipeline's request to have its real property assessed on the same basis as railroad property. In doing so, that court held that taxing railroad property differently from pipeline property did not violate either the Equal Protection Clause or the equal taxation provision of the Kansas Constitution.

The *ANR* court refused to follow the Nebraska decision noting that "[t]he Nebraska Constitution does not have property classifications." 866 P.2d at 1067. It observed that, unlike the Nebraska tax scheme, the Kansas Constitution "classifies all real and personal property and fixes the assessment rate for each

subclass." *Id.* at 1066. A 1992 amendment to the Kansas Constitution made railroad real property an exception to the public utility subclass to which it belonged. *Id.* at 1066-1067. The *ANR* court held that the challenged assessments did not violate the Kansas or United States Constitutions.

Oklahoma's tax scheme is similar to that of Kansas in that railroad property has been separately classified for different tax treatment. While the Kansas classification is found in its constitution, the Oklahoma classification is statutory pursuant to the express power to classify granted to the Oklahoma Legislature.

Finally, the Williams Companies' equal protection challenge to Oklahoma's Ad Valorem Tax Code constitutes an indirect attack on the validity of the 4-R Act and TEFRA. It should be noted that the constitutionality of the 4-R Act has been upheld in federal courts. *See Arizona v. Atchison T. & S.F.R.*, 656 F.2d 398 (9th Cir. 1981); *Louisville & N.R. v. Louisiana Tax Comm'n*, 498 F. Supp. 418, 421 (D.La. 1980); *Tennessee v. Louisville & N.R.*, 478 F. Supp. 199 (D. Tenn. 1979), *aff'd*, 652 F.2d 59 (2d Cir. 1981), *cert. denied*, 454 U.S. 834 (1981). No state or federal court has declared either the 4-R Act or TEFRA unconstitutional. Oklahoma's classification of railroads and airlines presents no equal protection violation.

OKLAHOMA CONSTITUTION

The Williams Companies next urge that the Board's assessments violate article X, section 5 of the Oklahoma Constitution. That section requires that "[t]axes be uniform upon the same class of subjects." However, because this Court has determined that a subclass of public service corporations was created by the Legislature, the applicable provision is section 22 of article X. It provides that "[n]othing in this Constitution shall be held, or construed, to prevent the classification of property for purposes of taxation; and the valuation of different classes by different means or methods." Railroads and airlines are a distinct subclass

of public service corporations whose property may, under the Oklahoma Constitution, be valued with a different assessment ratio.

OKLAHOMA'S AD VALOREM TAX CODE

The Williams Companies also argue that the Board's assessments violate sections 2803 (c) and 2847 of the Ad Valorem Tax Code. Section 2803 (c) requires that "[c]lassification as provided by this section shall require uniform treatment of each item within a class or any subclass as provided in Article X, Section 5 of the Oklahoma Constitution." Section 2847 requires in part that the assessment ratio "shall be selected by the State Board of Equalization and, subject to the requirements of federal law, uniformly applied to calculate the taxable values of public service corporation property within the state for the applicable assessment year."

These sections are statutory requirements of uniform ad valorem taxation within a class. Again, this case does not present an intra-class disparity of treatment. The airlines and railroads are within a legislatively created tax subclass. Therefore, no conflict with these sections is presented.

The Williams Companies have failed to demonstrate a violation of equal protection or ad valorem uniformity requirements. The Petition for Writ of Prohibition is denied.

ORIGINAL JURISDICTION ASSUMED; PETITION FOR WRIT OF PROHIBITION DENIED.

Concur: HODGES, C.J., SIMMS, HARGRAVE, SUMMERS, WATT, JJ.

Concur in Result: KAUGER, J.

Dissent: LAVENDER, V.C.J., OPALA, WILSON, JJ.

No. 84,097

In the Supreme Court of the State of Oklahoma

WILLIAMS NATURAL GAS COMPANY, WILLIAMS PIPE LINE COMPANY and WILLIAMS TELECOM GROUP,

Petitioners,

v.

THE STATE BOARD OF EQUALIZATION and THE OKLAHOMA TAX COMMISSION,

Respondents.

Filed Dec. 20, 1994

KAUGER, J. concurring in result:

Although the majority's discussion of equal protection rights has been centered upon the protection afforded by the United States Constitution and cases discussing its provisions, it has long been recognized that the due process clause found in art. 2, §7 of the Okla. Const.[1] has a definitional range which is coextensive with its federal counterpart. The United States Constitution and the Oklahoma Constitution each contain built-in anti-discrimination components which afford protection against unreasonable or unreasoned classifications which serve no important governmental interests.[2] The same equal protection component found in the fourteenth amendment of the United States Constitution is present in the due process clause of art. 2, §7.[3]

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[1] The Okla. Const. art. 2, §7 provides:

> "No person shall be deprived of life, liberty, or property, without due process of law."

[2] *Fair School Finance Council v. State*, 746 P.2d 1135, 1148 (Okla. 1987).

[3] *Callaway v. City of Edmond*, 791 P.2d 104, 106 (Okla. 1990); *Fair School Finance Council v. State*, see note 2, *supra*; *McKeever Drilling Co. v. Egbert*, 170 Okla. 259, 40 P.2d 32, 35 (1935).

The Williams Companies are entitled to the privileges and guarantees found both in the United States and the Oklahoma Constitutions. Nevertheless, there is nothing arbitrary or irrational in the Legislature's classification providing a different taxing method for public service corporations, the railroads and airlines. The ad valorem tax scheme furthers a legitimate state interest aligning Oklahoma's tax laws with federal legislation. It does not violate the protections afforded by the Okla. Const. art. 2, §7. My conclusion that the Williams Companies have failed to demonstrate a violation of equal protection or ad valorem uniformity requirements is based on the Oklahoma Constitution which provides bona fide, separate, adequate and independent grounds upon which to rest the holding.[4]

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[4] *Michigan v. Long*, 463 U.S. 1032, 1042, 103 S.Ct. 3469, 3476, 77 L.Ed.2d 1201, 1214 (1983).

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OPALA, J., with whom **LAVENDER, V.C.J.,** and **WILSON, J.,** join, dissenting.

The court holds today that the Legislature's compliance with certain federal statutes [1] – by creating a separate subclass of public service corporations[2] (comprised *only* of railroads and air carriers),[3] which *alone* qualify for a lower ad valorem assessment ratio than that afforded others (pipelines) in the same class of public service corporations—does not violate the Equal

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[1] *See* 49 U.S.C. § 1513(d)(1) [Tax Equity and Fiscal Responsibility Act of 1982], *infra* note 17, and 49 U.S.C. § 11503(b) [Railroad Revitalization and Regulatory Reform Act of 1976], *infra* note 16.

[2] For a statutory definition of *public service corporation,* see 68 O.S.1991 § 2808, *infra* note 43. For another definition of the term, though in a different context, see Art. 9, § 34, Okl.Const.

[3] The terms of 68 O.S.1991 § 2864 (C) provide:

"In determining the assessment ratio for all *air carrier property* and all *railroad property,* the State Board shall only consider the

Protection Clause of the 14th Amendment, U.S. Const.[4] The court's rationale for sanctioning the disparity of treatment in the ad valorem tax scheme under scrutiny in this case rests on federal law preemption. The court assumes original cognizance and denies the petitioners' [pipelines'] quest to prohibit the State Board of Equalization [State Board] from subjecting their property to an assessment ratio greater than that applied to railroad and air carrier property.[5]

I must recede from the court's pronouncement. The dispositive first impression issue in this original proceeding is whether the federal-law mandate — that the states not discriminate against *railroads* and *air carriers* by assessing their property at a higher ratio than the assessed value of other "commercial and industrial property" — violates the anti-discrimination component of the 5th Amendment's Due Process Clause[6] by not affording the same protection to other *common carriers in interstate commerce*. If I were writing for the court today, I would (a) *hold* that the congressional acts[7] invoked by the State are fatally infirm for an impermissible underinclusion

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ratio of the aggregate assessed value to the fair cash value of the locally assessed commercial/industrial real property of the state." (Emphasis added.)

[4] The Equal Protection Clause of the 14th Amend., § 1, U.S. Const., commands that no State shall "deny to any person within its jurisdiction the equal protection of the laws." Nordlinger v. Hahn, 505 U.S. __, 112 S. Ct. 2326, 2331 n.1, 120 L.Ed.2d 1 (1992).

[5] An assessment ratio of 12.08 percent (12.08%) for public service corporation property owned by air carriers was adopted by the State Board on June 20, 1994. Then, on July 15, 1994 a 22.85 percent (22.85%) assessment ratio was ratified for property owned by the petitioners (pipelines). Taxes calculated under these ratios will be due after April 1, 1995.

[6] The pertinent terms of the 5th Amend., U.S. Const., are:

" . . . nor [shall any person] be deprived of life, liberty, *or property*, without due process of law . . ." (Emphasis added.)

[7] Railroad Revitalization and Regulatory Reform Act of 1976, *infra* note 16, and Tax Equity and Fiscal Responsibility Act of 1982, *infra* note 17.

in the preferred class of *other common carriers in interstate commerce,* (b) *conclude* that the infirm federal acts have no preemptive effect on state law,[8] (c) *examine* the contested state tax laws for conformity to state fundamental-law equality[9] and uniformity[10] standards, (d) *direct* that, upon due notice and hearings, the State Board set an across-the-board assessment ratio that would apply *alike to all* public service corporations, and (e) *enjoin* that, on the State Board's failure to do so within some reasonable period of time to be set by the court, the petitioners could discharge their ad valorem tax liability at the assessment ratio *now* applicable *solely* to railroads and air carriers. Because the solution I advance represents a sharp break with recent practice, I would (a) give prospective effect to the court's pronouncement and make it apply to this case, to like challenges presently pending before the Court of Tax Review or before any administrative agency and to those challenges that are now in the appellate litigation process, (b) expressly reject any refund claims to be pressed by the affected entities for overpayment of taxes assessed at the impermissible ratio for any past years[11] and (c) postpone the effective date of the new assessment ratio required by my analysis until the fiscal year beginning July 1, 1996.

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[8] For a discussion of the federal acts' nonpreemptive effect, see Part IX, *infra*.

[9] Art. 10, § 22, Okl.Const., *infra* note 39.

[10] Art. 10, § 5, Okl.Const., *infra* note 38.

[11] For a discussion of the prospective effect I would give to my solution, see Part IX, *infra*.

I

UNDER THE FEDERAL OUSTER-OF-JURISDICTION DOCTRINE, THIS COURT IS NOT DIVESTED OF ITS *INHERENT* AUTHORITY TO TEST THE RAILROAD REVITALIZATION AND REGULATORY REFORM ACT OF 1976 AND THE TAX EQUITY AND FISCAL RESPONSIBILITY ACT OF 1982 FOR THEIR CONFORMITY TO THE MANDATORY STANDARDS OF THE U.S. CONSTITUTION

State courts have *inherent* authority and are presumptively competent to adjudicate claims arising under the laws of the United States.[12] To exclude state courts from this adjudicative

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[12] McKesson v. Div. of Alcoholic Beverages & Tobacco, 496 U.S. 18, 48, 110 S.Ct. 2238, 2246 n.10, 110 L.Ed.2d 17 (1990); Yellow Freights, Inc. v. Donnelly, 494 U.S. 820, 823, 110 S.Ct. 1566, 1568, 108 L.Ed.2d 834 (1990); Tafflin v. Levitt, 493 U.S. 455, 458-459, 110 S.Ct. 792, 795, 107 L.Ed.2d 887 (1990); Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 477-478, 101 S.Ct. 2870, 2875, 69 L.Ed.2d 784 (1981); Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 507-508, 82 S.Ct. 519, 522-523, 7 L.Ed.2d 483 (1962); Plaquemines Tropical Fruit Co. v. Henderson, 170 U.S. 511, 517, 18 S.Ct. 685, 688, 42 L.Ed. 1126 (1898); Chaflin v. Houseman, 93 U.S. 130, 136, 23 L.Ed. 833, 838 (1876); Houston v. Moore, 18 U.S. (5 Wheat.) 1, 25-26, 5 L.Ed. 19 (1820). The Court stated in Howlett By and Through Howlett v. Rose, 496 U.S. 356, 367, 110 S.Ct. 2430, 2438, 110 L.Ed.2d 332 (1990):

> "Federal law is enforceble in state courts not because Congress has determined that federal courts would otherwise be burdened or that state courts might provide a more convenient forum . . . but because the Constitution and laws passed pursuant to it are as much laws in the States as laws passed by the state legislature. The Supremacy Clause makes those laws 'the supreme Law of the Land,' and charges state courts with a coordinate responsibility to enforce that law according to their regular modes of procedure."

Testa v. Katt, 330 U.S. 386, 393, 67 S.Ct. 810, 814, 91 L.Ed. 967 (1947), teaches that the Supremacy Clause compels a state court to exercise jurisdic-

arena, Congress must *affirmatively divest (or oust)* them of their presumptively *concurrent jurisdiction.*[13] Congressional state-court ouster may be effected by (1) an explicit statutory directive, (2) *unmistakable* implication from legislative history, or (3) a *clear incompatibility* between state-court jurisdiction and federal interests. [14] *None of these indicia of ouster is present in the federal legislation we are called upon to consider in this case.*

Because my examination of the congressional acts, their legislative history and attendant jurisprudence reveals no federal ouster of state-court cognizance, I would proceed to test their validity under the applicable standards of the U.S. Constitution and hold them *fatally infirm* for the reasons stated in Parts IV, VI and VIII, *infra.*

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tion over a federal-law claim because *"the policy of the federal Act is the prevailing policy in every state."* (Emphasis supplied.) Any other result, the Court notes, "flies in the face of the fact that the States of the Union constitute a nation." *Id.,* 330 U.S. at 389, 67 S.Ct. at 812.

[13] *Howlett, supra* note 12, 496 U.S. at 368 n.15, 110 S.Ct. at 2438; *Yellow Freight, supra* note 12, 494 U.S. at 823, 110 S.Ct. at 1568; *Tafflin, supra* note 12, 493 U.S. at 459, 110 S.Ct. at 795. *See in this connection McKesson, supra* note 12, 496 U.S. at 48 n.10, 110 S.Ct. at 2246 ("'[I]n every case in which [state courts] were not expressly excluded by the future acts of the national legislature, they will of course take cognizance of the causes to which those acts may give birth .... [T]he inference seems to be conclusive that the *state courts would have a concurrent jurisdiction in all cases arising under the laws of the union, where it was not expressly prohibited*'"). *Id.* (quoting from The Federalist No. 82 at 555 (A.Hamilton) (J.Cook ed. 1961) (emphasis added).

[14] *Tafflin,* supra note 12, 493 U.S. at 459, 110 S.Ct. at 795; *Chaflin, supra* note 12, 93 U.S. at 136; *Houston, supra* note 12, 5 U.S. at 68; *Gulf Offshore, supra* note 12, 453, U.S. at 478, 101 S.Ct. at 2875.

II

THIS COURT IS NOT OFFENDING AGAINST THE ADVERSARY FORMAT OF THE PROCEEDINGS WHEN IT USES ITS OWN REASONING IN ADDRESSING THE PROPOSITIONS VIGOROUSLY ADVANCED BY THE PETITIONERS

Whenever in an original proceeding the petitioner vigorously and articulately urges a fully briefed legal proposition, this court is free to supply its own analysis and reasoning in addressing the petitioner's argument for the relief sought.[15]

Even though the petitioners argued that the assessment ratio affecting their property is violative of the state and federal fundamental law, they did not *expressly* call for constitutional condemnation of the two *federal acts* under consideration. Their failure vigorously to press that point in support of the proposition urged does not preclude this court from applying *sua sponte* the analysis I counsel today, which favors granting the relief petitioners seek by this original action.

III

THE FEDERAL AND STATE STATUTORY SCHEME

To revitalize the struggling railroad industry and to provide for "tax equity" in general, Congress enacted the Railroad Revitalization and Regulatory Reform Act of 1976 [4-R Act][16] and the Tax Equity and Fiscal Responsibility Act of 1982

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[15] California v. Rooney, 483 U.S. 307, 311, 107 S.Ct. 2852, 2854, 97 L.Ed.2d 258 (1987), *reh. denied,* 483 U.S. 1056, 108 S.Ct. 30, 97 L.Ed.2d 819 (1987); Black v. Cutter Laboratories, 351 U.S. 292, 297, 76 S.Ct. 824, 827, 100 L.Ed. 1188 (1956), *reh. denied,* 352 U.S. 859, 77 S.Ct. 21, 1 L.Ed.2d 69 (1956); *see also* Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842, 104 S.Ct. 2778, 2781, 81 L.Ed. 2d 694 (1984), *reh. denied,* 468 U.S. 1227, 105 S.Ct. 28, 82 L.Ed.2d 921 (1984); Williams v. Norris, 25 U.S. (12 Wheat.) 117, 120, 6 L.Ed. 571 (1827).

[16] The terms of 49 U.S.C. § 11503 (b) [4-R Act] provide in pertinent part:

[TEFRA].[17] Among other things, these two acts prohibit the states from assessing railroad and air carrier property at a level that has a higher ratio to true market worth than that borne by the assessed value of other "commercial and industrial property" in the same assessment jurisdiction. The petitioners, who as pipelines *also engage in interstate commerce, are not similarly shielded by the Congress from a higher state assessment ratio.*

"The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a *State or subdivision of a State may not* do any of them:

(1) *assess rail transportation property at a value that has a higher ratio* to the true market value of the rail transportation property *than the ratio that the assessed value of other commercial and industrial property* in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.

(2) levy or collect a tax on an assessment that may not be made under clause (1) of this subsection.

(3) levy or collect an ad valorem property tax on rail transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction. * * *" (Emphasis added.)

[17] The pertinent terms of 49 U.S.C. § 1513(d)(1) [TEFRA] are:

"(d) Acts which unreasonably burden and discriminate against interstate commerce; definitions

"(1) The following acts unreasonably burden and discriminate against interstate commerce and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:

(A) *assess air carrier transportation property at a value that has a higher ratio to the true market value of the air carrier transportation property than the ratio that the assessed value of other commercial and industrial property of the same type in the same assessment jurisdiction has to the true market value of the other commercial and industrial property;* * * * " (Emphasis added.)

Responding to the federal-law mandate, the Legislature created a subclass of railroad and air carrier property[18] and established for that category an assessment methodology which is *different* from that imposed upon the property of other public service corporations.[19] Section 2864(C) of the Ad Valorem Tax Code provides that in determining the assessment ratio for "all air carrier . . . and railroad property, the State Board shall only consider the ratio of the aggregate assessed value of the fair cash value to the locally assessed commercial/industrial real property of the state."[20] *No other public service corporations are afforded the same benefit. Based on the statutory scheme, the State Board adopted in 1994 an assessment ratio of 12.08% for air carrier and railroad property and 22. 85% for the petitioners.*[21]

The petitioners seek relief from the State Board's action in assessing their property at a ratio much higher than that applied to public service corporation property of air carriers and railroads. They urge the State Board's dissimilar treatment of members of the same class violates the 14th Amendment guarantee of equal protection[22] as well as the uniformity of taxation mandate in the state fundamental law.[23] The State Board asserts

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[18] *See* 68 O.S.1991 § 2864 (C), *supra* note 3; *see also* the terms of 68 O.S.1991 § 2803 (A), which provide:

> "A. The Legislature, pursuant to authority of Article X, Section 22 of the Oklahoma Constitution, hereby classifies the following types of property for purposes of ad valorem taxation:
>
> 1. Real property;
>
> 2. Personal property; and
>
> 3. Public service corporation property."

[19] For a statutory definition of *public service corporation,* see 68 O.S. 1991 § 2808, *infra* note 43.

[20] For the terms of 68 O.S.1991 § 2864(C), see *supra* note 3.

[21] *See supra* note 5.

[22] For the terms of the Equal Protection Clause of the 14th Amend., U.S. Const., see *supra* note 4.

[23] Art. 10, § 5, Okl.Const., *infra* note 38.

that its assessment ratios are based on the Legislature's legitimate response to the mandate of the two federal statutes invoked.

IV

MEASURED BY THE ANTI-DISCRIMINATION COMPONENT OF THE 5TH AMENDMENT'S DUE PROCESS CLAUSE, THE TWO FEDERAL STATUTES UNDER CONSIDERATION CREATE AN IMPERMISSIBLE SUBCLASS OF *COMMON CARRIERS IN INTERSTATE COMMERCE* WHICH IS VOID FOR UNDERINCLUSIVENESS

The equal protection command of the U.S. Constitution has one clear and central meaning — *it absolutely prohibits invidious governmental discrimination*. That standard, which, under the Equal Protection Clause of the 14th Amendment, [24] has to be met by *every state must also be obeyed by the federal government* under the command of the Due Process Clause in the 5th Amendment.[25] "Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment."[26]

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[24] *Nordlinger, supra* note 4, 505 U.S. at ___, 112 S.Ct. at 2331; Loving v. Virginia, 388 U.S. 1, 10, 87 S.Ct. 1817, 1822, 18 L.Ed.2d 1010 (1967); Hill v. Texas, 316 U.S. 400, 405, 62 S.Ct. 1159, 1162, 86 L.Ed. 1559 (1942).

[25] Although there is no equal protection clause in the 5th Amendment, the Court recognizes in its provisions the presence of an element of equal treatment under the law, which "stem[s] from our American ideal of fairness." Bolling v. Sharpe, 347 U.S. 497, 500, 74 S.Ct. 693, 694, 98 L.Ed. 884 (1954); *see also* Washington v. Davis, 426 U.S. 229, 239, 96 S.Ct. 2040, 2047, 48 L.Ed.2d 597 (1976); Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2, 95 S.Ct. 1225, 1228, 43 L.Ed.2d 514 (1975); Davis v. Passman, 442 U.S. 228, 234, 99 S.Ct. 2264, 2271, 60 L.Ed.2d 846 (1979). The equal protection component of the 5th Amendment forbids discrimination that is "so unjustifiable as to be violative of due process." *Bolling, supra,* 347 U.S. at 499, 74 S.Ct. at 694.

[26] Buckley v. Valeo, 424 U.S. 1, 93, 96 S.Ct. 612, 670, 46 L.Ed.2d 659 (1976).

Section 5 of the 14th Amendment[27] empowers Congress to enact legislation implementing the commands of that amendment. While the 14th Amendment's enforcement clause is a positive grant of power authorizing Congress to exercise its discretion in determining what statute is needed to shield equal protection guarantees, the 5th Amendment *prohibits that federal law-making body from assaulting those guarantees by the very legislation that is meant to secure them.* [28]

Economic legislation — like that in the two acts tendered for our consideration today — "that does not employ suspect classifications or impinge on judgmental rights must [generally] be upheld against equal protection attack when the legislative means are rationally related to a legitimate governmental purpose."[29] State legislation imposing a tax on one individual but

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[27] Section 5 of the 14th Amendment gives Congress the "power to enforce, by appropriate legislation, the provisions of this article." *See* Katzenback v. Morgan, 384 U.S. 641, 648-650, 86 S.Ct. 1717, 1722-1723, 16 L.Ed.2d 828 (1966), where the Court upheld Congress' statutory prohibition of state-imposed literacy tests because of their discriminatory effect upon illiterate minorities. There, the *Court subordinated its own contrary jurisprudence to the § 5 implementing legislation.*

[28] Shapiro v. Thompson, 394 U.S. 618, 630, 89 S.Ct.1322, 22 L.Ed.2d 600 (1969) (*overruled in part on other grounds,* Edelman v. Jordan, 415 U.S. 651, 671, 94 S.Ct. 1347, 1359-1360, 39 L.Ed.2d 662 (1974)); Graham v. Richardson, 403 U.S. 365, 382, 91 S.Ct. 1848, 1857, 29 L.Ed.2d 534 (1971); Mississippi University for Women v. Hogan, 458 U.S. 718, 732-733, 102 S.Ct. 3331, 3340, 73 L.Ed.2d 1090 (1982)(citing *Katzenback, supra* note 27); Williams v. Rhodes, 393 U.S. 23, 29, 89 S.Ct. 5, 9-10, 21 L.Ed.2d 24 (1968).

[29] Hodel v. Indiana, 452 U.S. 314, 331, 101 S.Ct. 2376, 2387, 69 L.Ed.2d 40 (1981); Schweiker v. Wilson, 450 U.S. 221, 230, 101 S.Ct. 1074, 1080, 67 L.Ed.2d 186 (1981); Western & Southern Life Ins. Co. v. State Board of Equalization, 451 U.S. 648, 668, 101 S.Ct. 2070, 2083, 68 L.Ed.2d 514 (1981); Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 461-463, 101 S.Ct. 715, 722-723, 66 L.Ed.2d 659 (1981) *reh. denied* 450 U.S. 1027, 101 S.Ct. 1735, 68 L.Ed.2d 222 (1981); United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 174-79, 101 S.Ct. 453, 459-61, 66 L.Ed.2d 368 (1980) *reh. denied* 450 U.S. 960, 101 S.Ct. 1421, 67 L.Ed.2d. 385 (1981); Kotch v. Board of River Pilot Commr's, 330 U.S. 552, 564, 67 S.Ct. 910, 916, 91 L.Ed.

not on others of the same class *may*, on the other hand, violate the Equal Protection Clause.[30] Federal economic legislation which has a discriminatory tax impact on class members *may similarly infringe* on due process rights. Whether Congress' mandate for nondiscriminatory state tax treatment of railroads and air carriers was passed in the exercise of its powers under the Commerce Clause or under the enforcement provisions in § 5 of the 14th Amendment, it is clear that the two federal statutes result in disparate treatment of pipelines, which, though falling within the congressionally established class of *common carriers in interstate commerce*, are denied the same shield against excessive state tax assessment ratios.[31] In sum, pipelines have been *excluded* by Congress from the *subclass* of favored common carriers who alone enjoy the palladium against burdensome taxation.[32]

1093 (1947) *reh.denied* 331 U.S. 864, 67 S.Ct. 1196, 91 L.Ed. 1869 (1947); Regan v. Taxation with Representation of Washington, 461 U.S. 540, 547, 103 S.Ct. 1997, 2001-2002, 76 L.Ed.2d 129 (1983); Exxon Corporation v. Eagerton, 462 U.S. 176, 195, 103 S.Ct. 2296, 2308, 76 L.Ed.2d 497 (1983); Eaton v. Jarvis Products Corp., 965 F.2d 922, 929 (10th Cir. 1992).

[30] Hillsborough Tp. v. Cromwell, 326 U.S. 620, 623, 66 S.Ct. 445, 448, 90 L.Ed. 358, 363 (1946); *cf.* City of New Orleans v. Dukes, 427 U.S. 297, 303-304, 96 S.Ct. 2513, 2516-2517, 49 L.Ed.2d 511 (1976) (states are given greater latitude in implementing purely economic regulations challenged as violative of the Equal Protection Clause of the 14th Amendment).

[31] The Interstate Commerce Act, 49 U.S.C. §§ 10101 (1988) *et seq.*, governs, among other things, all common and air carriers (if the latter are not statutorily included within the definition of common carrier) in interstate commerce. The terms of 49 U.S.C. § 10102 (4) define a *common carrier* as "an express career, *a pipeline carrier, a rail carrier,* a sleeping car carrier, a motor common carrier, a water common carrier, and a household goods freight forwarder." (Emphasis added.) Though there may be some doubt whether federal legislation includes air carriers under the heading of common carrier, I refer to the term *common carrier* as all-inclusive.

[32] *See* Appeal of ANR Pipeline Co., 254 Kan. 534, 543, 866 P.2d 1060, 1066-1067 (1994), *cert. denied*, __U.S.__, 115 S.Ct. 296, __L.Ed.2d__ (1994), where the court notes: "The brief of the [Kansas] Department of

When Congress singles out some members of a class for a benefit not given to others in the same class and no rational relation can be shown for the disparate treatment, an impermissible underinclusive class[33] is created which denies the excluded members equal treatment under the law. Legislative history, interpretive case law and the text of the two statutes demonstrate no rational relationship between the disparity created and some legitimate government aim to be achieved.[34] Congress, while favoring some common carriers, plainly omitted pipelines from the protective shield afforded by the two acts. When measured against the anti-discrimination component of the 5th Amendment, the two federal statutes in question are void for underinclusiveness. *I would so hold.*

The Supremacy Clause[35] mandates preemption of state regulation by discordant national legislation that is conformable to the U.S. Constitution.[36] Federal statutory law that would require this court to violate the equal-treatment command of the U.S. Constitution need not be obeyed as valid legislation.[37]

Revenue states *pipeline companies attempted unsuccessfully to obtain like federal legislation in their favor.* The statement is not disputed." (Emphasis added).

[33] For a discussion of impermissible under inclusive classifications, see Orr v. Orr, 440 U.S. 268, 272, 99 S.Ct. 1102, 1108, 59 L.Ed.2d 306 (1979); Stanton v. Stanton, 421 U.S. 7, 13-14, 95 S.Ct. 1373, 1377, 43 L.Ed.2d 688 (1975).

[34] Clements v. Fashing, 457 U.S. 957, 964, 102 S.Ct. 2836, 2844, 73 L.Ed.2d 508 (1982).

[35] Art. 6, cl. 2, U.S. Const., states in pertinent part:

> "This Constitution, and the Laws of the United States which shall be made in Pursuant thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, ... "

[36] Pac. Gas & Elc. v. St. Energy Resources Conserv., 461 U.S. 190, 203-204, 103 S.Ct. 1713, 1722, 75 L.Ed.2d 752 (1983).

[37] *Shapiro, supra* note 28, 394 U.S. at 630, 89 S.Ct at 1325; *Graham. supra* note 28, 403 U.S. at 382, 91 S.Ct at 1857.

V

ABSENT PREEMPTIVE FEDERAL LEGISLATION THAT IS FREE FROM CONSTITUTIONAL INFIRMITY, ART. 10, § 5, OKL.CONST.,[38] *COMMANDS* THE INCLUSION OF ALL PUBLIC SERVICE CORPORATIONS IN THE SAME TAX CLASSIFICATION

The State Constitution authorizes the Legislature to classify property for ad valorem taxation[39] and requires the State Board to assess uniformly all public service corporation property.[40] The Legislature has divided property that is subject to ad valorem tax into three classes — real, personal and public service corporation property[41] — and has then carved out of the latter class a subclass embracing *only* railroad and air carrier property.[42] For ad valorem taxation purposes, railroads, air

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[38] The terms of Art. 10, § 5, Okl.Const., are:

"The power of taxation shall never be surrendered, suspended, or contracted away. Taxes shall be uniform *upon the same class of subjects.*" (Emphasis added.)

[39] The terms of Art. 10, § 22, Okl.Const., are:

"Nothing in this Constitution shall be held, or construed, to prevent the classification of property for purposes of taxation; and the valuation of *different* classes by different means or methods. (Emphasis added.)

[40] Art. 10, § 5, Okl.Const., *supra* note 38. The terms of Art. 10, § 21, Okl.Const., are:

"A. There shall be a State Board of Equalization consisting of the Governor, State Auditor, State Treasurer, Lieutenant Governor, Attorney General, State Inspector and Examiner and President of the Board of Agriculture. The duty of said Board shall be to adjust and equalize the valuation of real and personal property of the several counties in the state . . . and they shall assess all railroad and public service corporation property. * * *".

[41] 68 O.S.1991 § 2803(A), *supra* note 18.

carriers *and pipeline companies* are all integral members of the same taxpayer category.[43] *They must hence be treated alike.*

Because I believe the federal legislation in question is constitutionally infirm, I would require that the State Board *comply with our own fundamental law mandating uniform assessment ratio for all entities within the same class.*

VI

CONGRESS MAY NOT AUTHORIZE THE STATES TO VIOLATE THE EQUAL PROTECTION CLAUSE

Assuming that the two federal acts *are not infirm* when tested for conformity to the 5th Amendment's anti-discrimination component, they must *nonetheless* be condemned as impermissible congressional commands to the states. This is so because both statutes clearly call for an unmistakable violation of the 14th Amendment's Equal Protection Clause.[44] The U.S. Supreme Court's jurisprudence inexorably commands the states to establish and follow an ad valorem tax regime that is not offensive to equal protection.[45] Federal *legislation*, on the other

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[42] 68 O.S.1991 § 2864(C), *supra* note 3.

[43] The terms of 68 O.S.1991 § 2808 provide in pertinent part:

> "A. The term public service corporation, as, used in the Ad Valorem Tax Code, shall include . . . all persons authorized . . . to use or occupy any right-of-way, street, alley, or public highway, along, over or under the same in a manner not permitted to the general public."

See Pure Oil Pipe Line Co. v. Cornish, 163 Okl. 79, 20 P.2d 1041, 1043-44 (1933).

[44] For the terms of the Equal Protection Clause of the 14th Amend., U.S. Const., see *supra* note 4; *Nordlinger, supra* note 4, 505 U.S. at __, 112 S.Ct. at 2331.

[45] Allegheny Pittsburgh Coal Co. v. County Comm'n, 488 U.S. 336, 344, 109 S.Ct. 633, 638, 102 L.Ed.2d 688 (1989); Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 359, 93 S.Ct. 1001, 1003, 35 L.Ed.2d 351

hand, requires that railroads and air carriers *not* be assessed at a higher ratio than that prescribed for commercial property.[46] The latter acts cannot be read in isolation from the *broader* U.S. constitutional mandate that calls upon the states to comply with equal protection guarantees.[47] Congress' statutory command that the states give air carriers and railroads preferential tax treatment plainly places the states' assessment regimes in contravention of the U.S. Supreme Court's equal protection jurisprudence. This is so because no rational basis exists for denying pipelines (and other similarly situated landowners) the palladium afforded by the constitutional requirement for an assessment regime that would pass equal protection muster.[48]

"Congress may not authorize the States to violate the Equal Protection Clause."[49] Although "deference [must be given] to congressional decisions and classifications, neither Congress nor a State can validate a law that denies the rights guaranteed by the Fourteenth Amendment."[50] The powers granted by the

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(1973) *reh. denied* 411 U.S. 910, 93 S.Ct. 1523, 36 L.Ed.2d 200 (1973). *Hillsborough, supra note 30*, teaches that "[t]he equal protection clause of the Fourteenth Amendment protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class. The right is the right to equal treatment." *Id.*, 326 U.S. at 623, 66 S.Ct. at 448. "[A] taxpayer, although assessed on not more than full value, may be unlawfully discriminated against by undervaluation of property of the same class belonging to others." Southern Railway Co. v. Watts, 260 U.S. 519, 526, 43 S.Ct. 192, 195, 67 L.Ed. 375 (1923).

[46] *See* 4-R Act, *supra* note 16; TEFRA, *supra* note 17.

[47] For the terms of the Equal Protection Clause of the 14th Amend., § 1, U.S.Const., see *supra* note 4; *see also Nordlinger, supra* note 4, 505 U.S. at __, 112 S.Ct. at 2331.

[48] Different treatment of similarly situated taxpayers does not violate equal protection so long as rational basis exists for the disparity of treatment. *Lehnhausen, supra* note 45, 410 U.S. at 359, 93 S.Ct. at 1003.

[49] *Shapiro, supra* note 28, 394 U.S. at 618, 89 S.Ct. at 1325; *Graham, supra* note 28, 403 U.S. at 382, 91 S.Ct. at 1857.

U.S. Constitution to the Congress or to the states "are always subject to the limitation that they may not be exercised in a way that violate[s] other specific provisions of the Constitution."[51]

The court today notes that the 4-R Act has been upheld by some federal courts[52] and that no state or federal court has ever declared either that act or TEFRA unconstitutional.[53] *The cases cited in the court's opinion are not persuasive as a legal barrier to the court's recognition of the constitutional flaw to which I allude.* In one of the cases, *Tennessee v. Louisville,*[54] the federal court applied a two-part test for determining the constitutionality of federal legislation *under the Commerce Clause*: such legislation, the court said, (1) must bear a rational nexus to an activity that affects interstate commerce; and (2) if Congress finds such a basis, it must select a reasonable and appropriate means of eliminating the detrimental effect the offending activity would exert on interstate commerce. None of these cases addressed the issue whether the federal legislation under our scrutiny today would pass constitutional muster either under the rational-basis test of the 5th Amendment's anti-discrimination component or under the 14th Amendment's Equal Protection Clause. In the

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[50] *Mississippi University, supra* note 28, 458 U.S. at 732-733, 102 S.Ct. at 3340 (citing *Katzenbach, supra* note 27).

[51] *Rhodes, supra* note 28, 393 U.S. at 29, 89 S.Ct. at 9-10.

[52] *See* State of Arizona v. Atchison, Topeka and Santa Fe RR Co., 656 F.2d 398, 405 (9th Cir. 1981); Louisville & Nashville RR Co. v. Louisiana Tax Comm'n, 498 F.Supp. 418, 422 (1980); Tennessee v. Louisville & Nashville RR Co., 478 F.Supp. 199, 206-207 (M.D.Tenn. 1979), *aff'd,* 652 F.2d 59 (6th Cir. 1981), *cert. denied,* 454 U.S. 834, 102 S.Ct. 135, 70 L.Ed.2d 114 (1981).

[53] My research reveals no federal TEFRA jurisprudence which addresses the constitutional validity of the Act against an attack based on the 5th Amendment's anti-discrimination component. In Salem Transp. Co. v. Port Authority of N.Y. & N.J., 611 F.Supp. 254, 258 (S.D.N.Y. 1985), the court held that a gross receipts fee levied by a market-participant local

absence of a binding Supreme Court precedent,[55] on substantive federal-law questions we follow, as a matter of *pure comity*, the Tenth Circuit pronouncements, and on issues affecting state action we defer to that court's constitutional jurisprudence.[56] *Because neither the U.S. Court of Appeals for the Tenth Circuit nor the highest federal Court ever has passed upon the issue before us here,*[57] *we need not today give deference to any extant federal case law.* In the exercise of its *inherent* authority under the U.S. Constitution, this court is competent to test the two federal statutes for constitutional orthodoxy.

VII

THE CONGRESSIONAL COMMERCE-CLAUSE POWERS DO NOT LEND SUPPORT TO THE VALIDITY OF THE TWO FEDERAL ACTS

Bacchus Imports, Ltd. v. Dias[58] struck down as violative of the Commerce Clause[59] a state excise tax which discriminated against interstate commerce by bestowing a commercial

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government entity violates neither the provisions of TEFRA nor Commerce Clause principles.

[54] *Tennessee, supra* note 52 at 206-207.

[55] No extant U.S. Supreme Court jurisprudence has addressed the constitutional validity of the federal law under scrutiny here (49 U.S.C.A. §§ 1513(d)(1)(A), l l503(b)(1)). In Dept. of Revenue of Or. v. ACF Industries, __ U.S. __, 114 S.Ct. 843, 849, 127 L.Ed.2d 165 (1994), a recent case construing the 4-R Act, the Court merely held the act's definition of "commercial and industrial property" *excludes* property exempted under applicable law.

[56] Phillips v. Williams, Okl., 608 P.2d 1131, 1135 (1980); McLin v. Trimble, Okl., 795 P.2d 1035, 1047 (1990)(0pala, J., dissenting).

[57] In Atchison, T. & S. F. Ry. Co. v. Lennen, 640 F.2d 255, 258-259 (l0th Cir. 1981), the court interpreted the 4-R Act to authorize injunctive relief to facilitate the Act's enforcement, *but had before it no issues of a constitutional dimension.*

[58] 468 U.S. 263, 272-273, 104 S.Ct. 3049, 3055-3056, 82 L.Ed.2d. 200 (1984).

advantage (excise tax exemption) on sales of wine and liquor made from local products while imposing a 20% excise tax on foreign liquor. The Court held that the states may not build up their domestic commerce by means of unequal and oppressive burdens placed upon the industry and business of other states. *Bacchus* teaches that *state economic protectionism cannot be rested on the legislative "characterization of an industry as either 'thriving' or 'struggling'".*[60]

The 4-R Act's purpose, stated in the congressional declaration of policy, is "to provide the means to rehabilitate and maintain the physical facilities, improve the operations and structure, and restore the financial stability of the railway system of the United States."[61] TEFRA's objective is "to provide for tax equity and financial responsibility."[62] Congress' solution to these goals was (a) § 11503, which prohibits discriminatory state taxation of railroad property[63] and (b) § 1513(d), which similarly shields air carrier property.[64] If the states cannot protect struggling entities by classifying them for a more favorable tax treatment, neither can Congress (the latter by failing to extend its protective arm to less deserving public service corporations) command the states to discriminate against businesses in interstate commerce in a manner that offends the U.S. Supreme Court's Commerce Clause jurisprudence.[65] I would hence re-

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[59] The pertinent terms of Art. 1, § 8, cl. 3, U.S.Const., are:

"The Congress shall have power . . . [t]o regulate Commerce with foreign Nations, and among the several States. . . ."

[60] *Bacchus, supra* note 58, 468 U.S at 272-273, 104 S.Ct. at 3056.

[61] Burlington Northern Railroad Company v. Oklahoma Tax Commission, 481 U.S. 454, 457, 107 S.Ct. 1855, 1857, 95 L.Ed.2d 404 (1987)(quoting from § 101(a), 90 Stat. 31).

[62] Public Law 97-248, Sept. 3, 1982, 96 Stat. 324.

[63] For the pertinent terms of 49 U.S.C. § 11503, see *supra* note 16; *see also Burlington Northern, supra* note 61, 481 U.S. at 457, 107 S.Ct. at 0858.

[64] For the pertinent terms of 49 U.S.C. § 1513(d), see *supra* note 17.

fuse today to give our imprimatur to federal legislation that places state governments in violation of the Commerce Clause by giving some public service corporations favorable tax treatment in an attempt to improve their financial stability, while denying the same economic advantage to others through an impermissible regime of *thriving/struggling* industry classification.

VIII

THE COURT'S ANALYSIS LEADS IT TO AN INDEFENSIBLE CONCLUSION

The State Board's *under*assessment of air carrier and railroad property will not pass constitutional muster under the 14th Amendment. The equal protection component of the 14th Amendment prohibits *that* state action which imposes on some members of a class burdens and liabilities which are not cast upon others similarly situated.[66] It makes no difference here whether the *under*assessment of air carrier or railroad property comes about because of deliberate action by the State Board, legislative enactments or by federal-law compulsion. The impact remains the same. The 14th Amendment's Equal Protection Clause commands that pipeline property be accorded tax treatment that *is the same* as that extended to other public service corporations. In short, by *under*assessing railroad and air carrier property, *the state has denied the pipelines equal protection of the law.*

Because our constitutional command — that public service corporation property be taxed uniformly[67] — is not and has not been shown to offend against any federal fundamental-law mandate, we cannot use today federal preemption as an excuse for violating our own fundamental law.

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[65] *Rhodes, supra* note 28, 393 U.S. at 29, 89 S.Ct. at 9-10, teaches that the powers granted by the Constitution to the Congress or to the states "are

IX

NATURE OF RELIEF TO BE GRANTED AS A REMEDY FOR THE OFFENDING ASSESSMENT RATIO

I would direct today that, upon due notice and hearings, the State Board set an across-the-board assessment ratio for *all* public service corporations. On the State Board's failure to do so within some reasonable period of time to be set by the court, I would direct that the petitioners could discharge their ad valorem tax liability at the assessment ratio now applicable *solely* to railroads and air carriers.[68]

Because my solution represents a *sharp break* with recent practice, I would give it prospective effect and make it apply to this proceeding, to like challenges presently pending before the Court of Tax Review or before any administrative agency and

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always subject to the limitation that they may not be exercised in a way that violate[s] other specific provisions to the Constitution."

[66] *Nordlinger, supra* note 4, 505 U.S. at __, 112 S.Ct. at 2331.

[67] *See* Part V, *supra*.

[68] Before promulgating the court's pronouncement *I would require the petitioners join in this case as parties respondent all railroads and air carriers presently benefiting from the acts* of Congress that are under consideration in this proceeding and would invite all those added entities to show cause why these acts should not be declared infirm for underinclusiveness.

"Where a statute is defective because of underinclusion . . . there exist two remedial alternatives: a court may either declare [it] a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by exclusion." Califano v. Westcott, 443 U.S. 76, 89, 99 S.Ct. 2655, 2663, 61 L.Ed.2d 382 (1979) (quoting Welsh v. United States, 398 U.S. 333, 361, 90 S.Ct. 1792, 1807-1808, 26 L.Ed.2d 308 (1970) (Harlan, J., concurring in result)); *Orr, supra* note 33, 440 U.S. at 272, 99 S.Ct. at 1108.

to challenges now in the appellate litigation process;[69] I would expressly reject any refund claims to be pressed by the adversely affected entities for overpayment of taxes assessed against their property at the impermissible ratio during any past years.[70] Changes to be implemented in the assessment ratio would be postponed to take effect during the fiscal year beginning July 1, 1996.

X

SUMMARY

Federal legislation which treats differently members of the same class without a rational basis for the imposed disparity cannot pass constitutional muster when measured *either by* the anti-discrimination component of the 5th Amendment's Due Process Clause *or* by the U.S. Supreme Court's Commerce Clause jurisprudence. The two federal acts in question here are fatally flawed by an impermissible underinclusion which affords some common carriers (railroads and air carriers) protection from discriminatory state ad valorem tax regime but excludes out-of-hand other members of the same class. State

[69] The prospective effect I would give today is known as the "pipeline doctrine". That doctrine saves from extinction those *interests presently in litigation* (i.e., the case before the court and cases pending before trial tribunals or in the appellate litigation process) *or capable of being litigated* when the new rule is announced. For Oklahoma jurisprudence applying a new rule of law to cases in the *pipeline* see Amoco Production v. Corp. Com'n of Okl., Okl.App., 751 P.2d 203, 208 (1986); Schepp v. Hess, Okl., 770 P.2d 34, 39 (1989); Dow Jones & Co. v. State ex rel. Tax Com'n, Okl., 787 P.2d 843, 847 (1990); Strelecki v. Oklahoma Tax Comm'n, Okl., 872 P.2d 910, 915 n. 44 (1994); Schulte v. Oklahoma Tax Commission, Okl., 882 P.2d 65, 75 (1994). James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 111 S.Ct. 2439, 2444-2445, 115 L.Ed.2d 481 (1991), is a U.S. Supreme Court refinement of the pipeline doctrine aimed at securing equality for all claims that are pending, or for those capable of being litigated, when the new rule is announced; *see also* Harper v. Virginia Dept. of Taxation, 509 U.S. __, 113 S.Ct. 2510, 2518, 125 L.Ed.2d 74 (1993).

[70] *Schulte, supra* note 69 at 74.

legislation passed in response to these federal-law commands clearly violates the 14th Amendment. Because under my analysis the two federal acts are clearly constitutionally infirm, I would hold today that they cannot operate to preempt contrary state law. The State Board should hence be declared free of federal-law restraint, and indeed *required by our own fundamental law*, to set a reasonable assessment ratio that *equally impacts the property of all public service corporations*. On the State Board's failure to act timely by establishing the required, even-handed assessment ratio, I would extend the benefit of the lower (railroad and air carrier) ratio to *all challengers*, who on like grounds are presently pressing claims before the Court of Tax Review or before any administrative agency, and to all those whose challenges are now in the appellate litigation process.

Lastly, I would give prospective effect to my pronouncement, making it apply to this case, to like challenges *presently* pending before the Court of Tax Review or before any administrative agency and to challenges *now* in appellate litigation process; I would expressly *reject* any refund claims to be pressed (by the adversely affected entities) for overpayment of taxes assessed against their property at the impermissible ratio during *any* past period and would postpone the effective date of the nonoffending ratio to be established to the fiscal year commencing July 1, 1996.

Appendix B

In the Supreme Court of the State of Oklahoma

FILED
SUPREME COURT
STATE OF OKLAHOMA
MAR 7, 1995
JAMES W. PATTERSON
CLERK

The Clerk is directed to issue to following orders:

82,410 ***John and Patty McCown etc. v. City of Elk City et. al.***
Petition for certiorari denied.
CONCUR: Hodges, Lavender, Simms, Hargrave, Opala, Summers, Watt, JJ.
DISSENT: Wilson, C.J., Kauger, V.C.J.

82,671 ***Randy and Patty Martin v. Jack Yates etc. et al.***
Petition for certiorari denied.
CONCUR: All Justices concur.

82,821 ***(comp. w/ 82,822) The State of Oklahoma v. Jiminez Geraldo Escobar v. American Bankers Life Insurance Company.***
Petition for certiorari denied.
CONCUR: All Justices concur.

82,822 ***(comp. w/ 82,821) The State of Oklahoma v. Gerardo Melchor Madrigal v. American Bankers Life Insurance Company.***
Petition for certiorari denied.
CONCUR: All Justices concur.

83,143 ***Floyd Electric Motor Company, Inc. v. Professional Services Group, Inc.***
Petition for certiorari denied.
CONCUR: All Justices concur.

83,255 ***In the Matter of the Estate of Henry Treisa and Verda M. Treisa, deceased.***
Petition for certiorari denied.
CONCUR: Kauger, V.C.J., Lavender, Simms, Hargrave, Opala, Summers, JJ.
DISSENT: Wilson, C.J., Hodges, Watt, JJ.

83,420 ***Warehouse Market, Inc. etc. v. Charles Daniel Sayre et al.***
Petition for certiorari denied.
CONCUR: All Justices concur.

84,097 ***Williams Natural Gas Company et al. v. State Board of Equalization and Oklahoma Tax Commission.***
Petitions for rehearing denied. Petitioners and Intervenors motion to stay denied
VOTE ON REHEARING:
CONCUR: Kauger, V.C.J., Hodges, Simms, Hargrave, Summers, Watt, JJ.
DISSENT: Wilson, C.J., Lavender, Opala, JJ.
VOTE ON MOTION TO STAY DENIED:
CONCUR: All Justices concur.

Response due: 6-5

Docketed: 3-8 cm

/s/ Alma Wilson
CHIEF JUSTICE

Appendix C

49 U.S.C. § 11503.
Tax discrimination against rail transportation property

(a) In this section—

(1) "assessment" means valuation for a property tax levied by a taxing district.

(2) "assessment jurisdiction" means a geographical area in a State used in determining the assessed value of property for ad valorem taxation.

(3) "rail transportation property" means property, as defined by the Interstate Commerce Commission, owned or used by a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title.

(4) "commercial and industrial property" means property, other than transportation property and land used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and subject to a property tax levy.

(b) The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:

(1) assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial industrial property.

(2) levy or collect a tax on an assessment that may not be made under clause (1) of this subsection.

(3) levy or collect an ad valorem property tax on rail transportation property at a tax rate that exceeds that

tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

(4) impose another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title.

(c) Notwithstanding section 1341 of title 28 and without regard to the amount in 'controversy or citizenship of the parties,' a district court of the United States has jurisdiction, concurrent with other jurisdiction of courts of the United States and the States, to prevent a violation of subsection (b) of this section. Relief may be granted under this subsection only if the ratio of assessed value to true market value of rail transportation property exceeds by at least 5 percent, the ratio of assessed value to true market value of other commercial and industrial property in the same assessment jurisdiction. The burden of proof in determining assessed value and true market value is governed by State law. If the ratio of the assessed value of other commercial and industrial property in the assessment jurisdiction to the true market value of all other commercial and industrial property cannot be determined to the satisfaction of the district court through the random-sampling method known as a sales assessment ratio study (to be carried out under statistical principles applicable to such a study), the court shall find, as a violation of this section—

(1) an assessment of the rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the assessed value of all other property subject to a property tax levy in the assessment jurisdiction has to the true market value of all other commercial and industrial property; and

(2) the collection of an ad valorem property tax on the rail transportation property at a tax rate that exceeds the tax ratio rate applicable to taxable property in the taxing district.

Appendix D

Title 49. Transportation

Subtitle VII. Aviation Programs
Part A. Air Commerce and Safety
Subpart I. General
Chapter 401. General Provisions

49 U.S.C. § 40116 (1994)

Section 40116. State Taxation

(a) Definition. In this section, "State" includes the District of Columbia, a territory or possession of the United States, and a political authority of at least 2 States.

(b) Prohibitions. Except as provided in subsection (c) of this section and section 40117 of this title, a State or political subdivision of a State may not levy or collect a tax, fee, head charge, or other charge on - -

(1) an individual traveling in air commerce;

(2) the transportation of an individual traveling in air commerce;

(3) the sale of air transportation; or

(4) the gross receipts from that air commerce or transportation.

(c) Aircraft taking off or landing in State. A State or political subdivision of a State may levy or collect a tax on or related to a flight of a commercial aircraft or an activity or service on the aircraft only if the aircraft takes off or lands in the State or political subdivision as part of the flight.

(d) Unreasonable burdens and discrimination against interstate commerce.

(1) In this subsection - -

(A) "air carrier transportation property" means property (as defined by the Secretary of Transportation) that an air carrier providing air transportation owns or uses.

(B) "assessment" means valuation for a property tax levied by a taxing district.

(C) "assessment jurisdiction" means a geographical area in a State used in determining the assessed value of property for ad valorem taxation.

(D) "commercial and industrial property" means property (except transportation property and land used primarily for agriculture or timber growing) devoted to a commercial or industrial use and subject to a property tax levy.

(2) (A) A State, political subdivsion of a State, or authority acting for a State or political subdivision may not do any of the following acts because those acts unreasonably burden and discriminate against interstate commerce:

(i) assess air carrier transportation property at a value that has a higher ratio to the true market value of the property than the ratio that the assessed value of other commercial and industrial property of the same type in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.

(ii) levy or collect a tax on an assessment that may not be made under clause (i) of this subparagraph.

(iii) levy or collect an ad valorem property tax on air carrier transportation property at a tax rate greater than the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

(iv) Levy or collect a tax, fee, or charge, first taking effect after the date of the enactment of this clause, exclusively upon any business located at a commerical service airport or operating as a permittee of such an airport other than a tax, fee, or charge wholly utilized for airport or aeronautical purposes.

(B) Subparagraph (A) of this paragraph does not apply to an in lieu tax completely used for airport and aeronautical purposes.

(e) Other allowable taxes and charges. Except as provided in subsection (d) of this section, a State or political subdivision of a State may levy or collect - -

(1) taxes (except those taxes enumerated in subsection (b) of this section), including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services; and

(2) reasonable rental charges, landing fees, and other service charges from aircraft operators for using airport facilities of an airport owned or operated by that State or subdivision.

(f) Pay of air carrier employees.

(1) In this subsection - -

(A) "pay" means money received by an employee for services.

(B) "State" means a State of the United States, the District of Columbia, and a territory or possession of the United States.

(C) an employee is deemed to have earned 50 percent of the employee's pay in a State or political subdivision of a State in which the scheduled flight time of the employee in the State or subdivision is more than 50 percent of the total scheduled flight time of the employee when employed during the calendar year.

(2) The pay of an employee of an air carrier having regularly assigned duties on aircraft in at least 2 States is subject to the income tax laws of only the following:

(A) the state or political subdivision of the State that is the residence of the employee.

(B) the State or political subdivision of the State in which the employee earns more than 50 percent of the pay received by the employee from the carrier.

(3) Compensation paid by an air carrier to an employee described in subsection (a) in connection with such employee's authorized leave or other authorized absence from regular duties on the carrier's aircraft in order to perform services on behalf of the employee's airline union shall be subject to the income tax laws of only the following:

(A) The State or political subdivision of the State that is the residence of the employee.

(B) The State or political subdivision of the State in which the employee's scheduled flight time would have been more than 50 percent of the employee's total scheduled flight time for the calendar year had the employee been engaged full time in the performance of regularly assigned duties on the carrier's aircraft.

HISTORY: (July 5, 1994, P.L. 103-272, @ 1 (e), 108 Stat. 1111; Aug. 23, 1994, P.L. 103-305, Title I, @ 112 (e), Title II, @ 208, 108 Stat. 1576, 1588.)

Appendix E

§ 2864
State Board of Equalization—Membership – Sessions – Officers – Quorum – Powers, duties and authority

A. The Governor, State Auditor and Inspector, State Treasurer, Lieutenant Governor, Attorney General, Superintendent of Public Instruction and President of the Board of Agriculture shall constitute the State Board of Equalization, and the State Board of Equalization must hold a session at the Capitol of the State, commencing at ten o'clock a.m. on December 1, or the first working day thereafter of each year for the purpose of equalizing the taxable property values of the several counties for the next following assessment year. The State Auditor and Inspector shall notify all other members of said Board of the time and place of said annual session as herein required. The Governor shall serve as chairman and the State Auditor and Inspector shall serve as secretary of said Board, and vice-chairman shall be elected from the other members. In case of the absence or failure of said chairman and secretary, or either of them, to so act on the statutory meeting date, any four or more members thereof shall proceed on said date to conduct the Board's session and carry on its work as herein required. Any official action by said Board shall require approval by a majority of all members of the Board.

B. It shall be the duty of said State Board to examine the various county assessments and to equalize, correct and adjust the same as between and within the counties by determining the ratio of the aggregate assessed value of the property or any class thereof, in any or all of them, to the fair cash value thereof as herein defined, and to order and direct the assessment rolls of any county in this state to be so corrected as to adjust and

equalize the valuation of the real and personal property among the several counties during the next succeeding assessment year.

C. In determining the assessment ratio for all air carrier property and all railroad property, the State Board shall only consider the ratio of the aggregate assessed value to the fair cash value of the locally assessed commercial/industrial real property of the state.

D. In order to equalize, correct and adjust the various county assessments within the counties as required by this section, the State Board of Equalization shall analyze the relationship between the assessed value and the fair cash value for each use category of real property and separately analyze the relationship between the assessed value and the fair cash value for the agricultural use category, the residential use category and the commercial/industrial use category. If Article X, Section 8 of the Oklahoma Constitution provides for a system in which less than one hundred percent (100%) of value is taxable, the State Board of Equalization shall order any increase or decrease determined by the State Board of Equalization to be necessary for equalization of property values within the county, including, but not limited to, the authority to require an assessment ratio for a use category bearing a specific relationship to the percentage used to determine taxable value of real property in the county for the applicable assessment year. If Article X, Section 8 of the Oklahoma Constitution provides for a system in which one hundred percent (100%) of value is taxable, the State Board of Equalization shall make such order as authorized by Article X, Section 8 of the Oklahoma Constitution.

E. The State Board of Equalization shall equalize, correct and adjust the various county assessments as between the counties as required by this section by ordering any increase or decrease required as prescribed by this subsection. If Article X, Section 8 of Oklahoma Constitution provides for a system in which less than one hundred percent (100%) of value is taxable,

the State Board of Equalization shall order any increase or decrease required to comply with the minimum or maximum acceptable assessment ratio in effect for the applicable assessment year. If Article X, Section 8 of the Oklahoma Constitution provides for a system in which one hundred percent (100%) of value is taxable, the State Board of Equalization shall order any increase or decrease required to ensure that the assessment ratio for any county is not less than ninety-two percent (92%) and not greater than one hundred percent (100%) as provided by Article X, Section 8 of the Oklahoma Constitution.

Laws 1988, c. 162, § 64, eff. Jan. 1, 1992. Laws 1990, c. 212, § 2, eff. Jan. 1, 1992.

(2)

No. 94-1990

Supreme Court, U.S.
FILED
JUL 10 1995
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

ANR PIPELINE COMPANY AND
COLORADO INTERSTATE GAS COMPANY,

Petitioners,

v.

THE STATE BOARD OF EQUALIZATION AND
THE OKLAHOMA TAX COMMISSION,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Oklahoma

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

May the State of Oklahoma assess, for property tax purposes, pipelines at an assessment percentage different than that applied to airlines and railroads when pipelines are in a tax class separate and distinct from airlines and railroads.

SUBJECT INDEX

Page

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 3

REASONS FOR DENYING THE WRIT

I. PROPERTY TAX RELIEF FOR PIPELINES IS FOR CONGRESS AND NOT THE COURTS 4

II. THE DECISION OF THE OKLAHOMA SUPREME COURT DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER STATE COURT OF LAST RESORT . . . 8

III. THE DECISION OF THE OKLAHOMA SUPREME COURT DOES NOT CONFLICT WITH EQUAL PROTECTION DECISIONS OF THIS COURT 12

CONCLUSION 15

TABLE OF AUTHORITIES

Page

CASES CITED

Allegheny Pittsburgh Coal Company v. County Commission of Webster County, West Virginia, 48 U.S. 336, 109 S.Ct. 633,102 L.Ed.2d 688 (1989) . 4,13

Allied Stores of Ohio v. Bowers, 358 U.S. 522, 79 S.Ct. 437, 3 L.Ed.2d 480 (1959) 4

Appeal of ANR Pipeline Company, 866 P.2d 1060 (Kan.1994), cert. denied 115 S.Ct. 296 (1994) . 6,9,14,15

Brown - Forman Company v. Kentucky, 317 U.S. 563, 30 S.Ct. 578, 54 L.Ed.2d 883 (1910) . 4-5

Clinchfield Railroad Company v. Lynch, 784 F.2d 545 (4th Cir.1986) 15

Federal Express Corp. v. Tennessee State Board of Equalization, 717 S.W.2d 873 (Tenn.1986) 10

Table of Authorities (continued)

Page

Lehnhausen v. Lake Shore Auto Parts Company, 410 U.S. 356, 935 S.Ct. 1001, 35 L.Ed. 2d 351, (1973) 13

McDonald v. Board of Election Commissioners of Chicago, 394 U.S. 802, 98 S.Ct. 1404, 22 L.Ed.2d 739 (1969) . 14

McGowan v. Maryland, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961) 12

Nordlinger v. Hahn, 505 U.S. _____, 112 S.Ct. 2326, 120 L.Ed.2d 1 (1992) 13

Northern Natural Gas Company v. State Board of Equalization and Assessment, 443 N.W.2d 249 (1989), cert. denied 493 U.S. 1078 (1990) 8

Oregon Revenue Department v. ACF Industries Inc., 510 U.S. _____, 114 S.Ct. 843, 127 L.Ed.2d 165 (1994) 7

State of Alabama v. Colonial Pipeline, 471 So.2d 408 (Ala.Civ.App.1984) 11

Table of Authorities (continued)

STATUTES CITED

Page

49 U.S.C. § 11503 5

49 U.S.C. § 40116 5

68 O.S. 1991 § 2864(C) 2, 6

OTHER AUTHORITIES

Fourteenth Amendment, U.S. Const. 2

Art. VIII, § 1, Neb. Const. 8

Art. X, § 5, Okla.Const. 2

Art. X § 22, Okla. Const. 5,8

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

No. 94-1990

ANR PIPELINE COMPANY AND COLORADO INTERSTATE GAS COMPANY,

Petitioners,

v.

THE STATE BOARD OF EQUALIZATION AND THE OKLAHOMA TAX COMMISSION,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of Oklahoma

---

RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully request that this Court deny the Petition for Writ of Certiorari seeking review of the Opinion of the Oklahoma Supreme Court entered on December 20, 1994.

STATEMENT OF THE CASE

The facts of the case are stated in the Opinion below and in the Petition. Summarized, the basic facts of the case are as follows:

In Oklahoma, airlines, railroads and other public service corporations are valued for purposes of ad valorem taxation by the Oklahoma State Board of Equalization. The Board assesses ad valorem taxes by 1) establishing a fair cash value for property and 2) fixing an assessment percentage for the property. Oklahoma law provides that "in determining the assessment ratio for all air carrier property and all railroad property, the State Board shall only consider the ratio of the aggregate assessed value to the fair cash value of the locally assessed commercial/industrial real property of the state." 68 O.S. 1991 § 2864(C).

In June, 1994, the State Board adopted an assessment ratio of 12.08 percent for airline and railroad property. In July, the Board adopted a ratio of 22.85 percent for public service corporations (including pipelines).

An original proceeding was filed with the Oklahoma Supreme Court claiming that 1) the assessments violate the equal protection clause of the Fourteenth Amendment to the United States Constitution, (2) the assessments violate Article X, Section 5 of the Oklahoma Constitution which requires uniform taxation within a tax class, and (3) the assessments violate Sections 2803(C) and 2847 of the Oklahoma Ad Valorem Tax Code, which require uniform treatment in ad valorem taxation. The relief sought was to have the same assessment ratio applied to protestant's property that was applied to railroad and airline property.

On December 20, 1994, the Oklahoma State Supreme Court found that under Oklahoma law railroads and airlines are a distinct subclass of public service corporations whose property may, under the Oklahoma Constitution, be valued with a different tax assessment ratio. The Court also held that Oklahoma classification of railroads and airlines presented no federal equal protection violation. Additionally, the Court found that, under Oklahoma law, there was no violation of the intra-class equalization provisions.

Summary of Argument

The State of Oklahoma has established airlines and railroads as a distinct subclass of property for purposes of ad valorem taxation. Equal protection only requires that similarly situated taxpayers be treated the same. The Oklahoma Supreme Court has found that, under Oklahoma law, airlines and railroads are not in the same tax class and, therefore, not similarly situated to other public service corporations (including petitioners). Therefore, where the State Board of Equalization applied differing assessment ratios to petitioners and airlines and railroads, it was not in violation of the equal protection provisions of the federal constitution.

Oklahoma's creation of a distinct class for airlines and railroads was in response to federal law, and was entirely reasonable and in conformity with the equal protection tests enunciated by this Court. Petitioners are attempting through a distortion of the equal protection concept to receive relief that, to date, Congress has granted only to airlines and railroads, and not to other public service corporations (including petitioners).

REASONS FOR DENYING THE WRIT

I. PROPERTY TAX RELIEF FOR PIPELINES IS FOR CONGRESS AND NOT THE COURTS

As the United States Supreme Court has recognized on many occasions, states have broad powers to impose and collect taxes, and the state may divide different kinds of property into classes and assign to each class a different tax burden as long as those divisions and burdens are reasonable. *Allegheny Pittsburgh Coal Company v. County Commission of Webster County, West Virginia*, 448 U.S. 336, 344, 109 S.Ct. 633, 102 L.Ed.2d 688 (1989).

In *Allied Stores of Ohio v. Bowers*, 358 U.S. 522, 79 S.Ct. 437, 3 L.Ed.2d 480 (1959), the United States Supreme Court held:

> The State may impose different specific taxes upon different trades and professions, and may vary the rate of excise on various products.

In *Allegheny*, the Supreme Court recognized that states may properly classify property on the basis of ownership, and tax such classifications at different rates:

> It [the state] might, for example, decide to tax property held by corporations, including petitioners, at a different rate than property held by individuals. [cites omitted] In each case, '[i]f the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of the equal protection of the law.' *Brown - Forman*

> *Company v. Kentucky*, 317 U.S. 563, 573, 30 S.Ct. 578, 580, 54 L.Ed.2d 883 (1910).

448 U.S. at 344, 109 S.Ct. at 638, 102 L.Ed.2d at 697.

Under Article X, Section 22 of the Oklahoma Constitution, the State of Oklahoma recognizes the ability of the state to establish classifications for property tax purposes. The Constitution provides:

> Nothing in this Constitution shall be held, or construed, to prevent the classification of property for purposes of taxation; and the valuation of different classes by different means or methods.

In its decision the Oklahoma Supreme Court found the Oklahoma Legislature had established four classes of property for ad valorem tax purposes. The court found that air carrier and railroad property was distinct from public service corporation property (such as pipelines) and that there was no requirement of tax ratio equality under either the federal or Oklahoma Constitution.

To prevent discriminatory taxation of railroad property by the states, Congress enacted the Railroad Revitalization and Regulatory Reform Act (the 4-R Act), 49 U.S.C. § 11503. That Act, among other things, prohibits the states from taxing railroad property at a value that has a higher ratio to true market value than the assessed value of other "commercial and industrial property", in the same assessment jurisdiction. Airline property, under the provisions of the Tax Equity and Fiscal Responsibility Act ("TEFRA"), 49 U.S.C. § 40116, is provided similar protection.

The federal requirements that railroad and airline properties be taxed at no higher ratios than those used to assess other "commercial and industrial property" in the same assessment jurisdiction, made it unlawful for Oklahoma to continue to classify and tax railroad and airline property as public service corporation property. This is so because while public service corporation property certainly comes within the category of "commercial and industrial property", public service corporation property constitutes merely a statutorily defined sub-set of the state's larger set "commercial and industrial property". Non-public service commercial and industrial property is assessed by local county assessors as either real or personal property.

In recognition of the requirements of federal law, and the supremacy clause requirement that the state fully comply with federal law, the Oklahoma Legislature created the air carrier and railroad property class. This was accomplished by the enactment of 68 O.S. § 2864(C). ,

In this case, as the Oklahoma Supreme Court found, the classification of railroad and airline property, for tax purposes, is more than reasonable. The classification is based upon the special protection afforded property of such entities by federal law, protection which pipelines for over a decade have been trying to secure from Congress. *In the matter of the Appeal of ANR Pipeline Company*, 866 P.2d 1060, 1066-67 (Kan. 1994), cert. denied 115 S.Ct. 296 (1994).

Petitioners want, under the guise of equal protection, to be afforded the same tax ratio applicable to airlines and railroads. To grant such relief would, in effect, extend the provisions to 4-R and TEFRA to entities outside the scope of federal protection.

The Oklahoma Supreme Court rejected petitioner's assertion that equal protection mandated the same tax treatment for airlines, railroads and pipelines. To grant petitioner the relief sought this Court would have to conclude that 4-R and TEFRA, in essence, eliminated the public service class of property created by the Oklahoma Constitution. Such a holding would destroy Oklahoma's classification system, at least as applied to public service corporations.

This Court has been hesitant to extend the provisions of a federal statute that preempts the state's taxation authority beyond its evident scope. *Oregon Revenue Department v. ACF Industries Inc.*, 510 U.S. _____, 114 S.Ct. 843, 127 L.Ed.2d 165 (1994). The Oklahoma Supreme Court recognized the supremacy of federal law and determined that Oklahoma's classification of railroads and airlines as a distinct class for ad valorem taxation purposes was consistent with equal protection principles articulated by this Court. However, the Oklahoma Supreme Court limited the preemptive effect of TEFRA and 4-R to its intended beneficiaries, namely airlines and railroads. By creating the airline and railroad subclassification of property the State of Oklahoma has avoided discrimination while at the same time maintaining its tax structure as to entities not within the ambit of federal protection.

Petitioners are attempting to obtain from the judiciary what they have been unable to obtain from Congress. It is the prerogative of Congress, under its commerce powers, to determine whether pipelines should receive the same treatment under federal laws as Congress has provided airlines and railroads. The Oklahoma Supreme Court

properly rejected petitioner's attempt to obtain property tax relief through abrogation of the Oklahoma tax classification system and, for that reason, this Court should deny the Petition for Writ of Certiorari.

II. THE DECISION OF THE OKLAHOMA SUPREME COURT DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER STATE COURT OF LAST RESORT.

Petitioners argue that the decision of the Oklahoma Court conflicts with the decision of the Nebraska Supreme Court in *Northern Natural Gas Company v. State Board of Equalization and Assessment*, 443 N.W.2d 249 (1989), cert. denied 493 U.S. 1078 (1990). The Oklahoma Supreme Court found a vital distinction between the facts of *Northern Natural Gas* and this case. The distinction is that in *Northern* the Nebraska board treated taxpayers of the same class differently. The Nebraska Constitution requires that "taxes shall be levied by valuation uniformly and proportionally upon all taxable property." Neb. Const. art. VIII, § 1. A careful analysis of the *Northern Natural Gas* case reveals that pipeline property was required to be equalized with railroad property under this provision of the Nebraska Constitution regardless of the ramifications of 4-R or TEFRA.

There is a vital distinction between the Oklahoma and Nebraska ad valorem tax systems. The Oklahoma Constitution permits the legislature to establish different tax classes in which property can be assessed differently. Okla. Const. art. X § 22. Airlines and railroads are in a

legislatively-created subclass of public service corporation property. Nebraska has a single class of property for assessment purposes, and all property is entitled to uniform treatment under state law. Oklahoma only requires uniform tax treatment within constitutionally-prescribed classes. Under the Oklahoma system, public service property (including pipelines) constitutes a distinct class of property and airlines and railroads constitute another class of property. Under the 4-R and TEFRA Acts, airlines and railroads are required to be equalized with commercial and industrial property. In order to comply with the provisions of the 4-R and TEFRA Acts requiring equalization with commercial and industrial property, Oklahoma, unlike Nebraska, had the ability to create a subclass for ad valorem purposes. This fundamental distinction, recognized by the court below, sets this case apart from the Nebraska case and explains any perceived inconsistency.

The Oklahoma Supreme Court was more persuaded by case law from Kansas, Alabama and Tennessee. Courts in those states have held that legislative tax classifications of railroads and airlines on one hand and other entities on the other hand, did not violate the federal equal protection clause. In the Kansas case, *Appeal of ANR Pipeline Company*, 866 P.2d 1060 (Kan.1994), cert. denied 115 S.Ct. 296 (1994) the Kansas Supreme Court rejected a pipeline's request to have its real property assessed on the same basis as railroad property. In the ANR case the Kansas Supreme Court was faced with the situation wherein real and personal property owned by public utilities was to be assessed at 30 percent of its fair cash value. Pursuant to Kansas law, both *ANR* and railroads are public utilities. The Kansas Supreme Court found that 4-R

required that railroad property be assessed at no higher rate than commercial or industrial property, and that railroad property was thereby made an exception to the subclass to which public utility property was assigned. Id. at 1065. At page 1066 of its Opinion the Kansas Court found that 4-R placed limitations on state taxation of railroad property and that "there can be little doubt that this is a preemption." The Court further stated:

> If this is not a preemption, the 4-R Act is just a piece of paper suggesting railroads should be treated like other commercial and industrial property and that the enforcement section thereof is surplusage. Clearly, that was not the Congressional intent in enacting the 4-R Act.

In *Federal Express Corp. v. Tennessee State Board of Equalization*, 717 S.W.2d 873 (Tenn.1986), the Tennessee Supreme Court considered a taxpayer's challenge to the assessment of its property at the 55 percent rate applicable to public utility property rather than the 30 percent rate applicable to commercial and industrial property. In rejecting the contention that the equal protection clause forbade the state from assessing taxpayer's property at the rate applicable to utility property while assessing railroads at the lower rate applicable to commercial and industrial property, the Court reasoned that the 4-R Act preempted the state's classification of railroads and provided that they should be taxed as other commercial and industrial property is taxed, leaving in effect the state's tax treatment of other public utilities.

In the *State of Alabama v. Colonial Pipeline*, 471 So.2d 408 (Ala.Civ.App.1984), appeal denied 474 U.S. 936 (1985), the Alabama Court of Civil Appeals considered a pipeline's challenge to the assessment of its property at the highest applicable rate that was prescribed for public utility property. As in this case, the property of railroads have been assessed at a lower rate than the rate applicable to the pipeline's property because of the requirements of the 4-R Act. In an opinion rejecting the pipeline's objection to its assessment at the public utility rate, the court dismissed the suggestion that disparate treatment of pipelines, on the one hand, and railroads, on the other, would violate the equal protection clause even though the property of the pipelines and railroads was included within the same property tax classification category under state law. The Court, citing the supremacy of federal law, found that the 4-R Act preempted the state classification system as applied to railroads but left it in place as applied to pipelines.

Both the Tennessee and Alabama courts determined that 4-R had preempted application of certain state taxing schemes to railroads. However, the courts recognized that this preemption went only as far as the intent of the federal statute, which was to prohibit discriminatory taxation of railroad real and personal property by state and local property tax laws.

Nebraska, unlike Oklahoma, has not separately classified public utility property and was required to equalize railroad property with commercial and industrial property under state law. As stated above, Oklahoma has a different system of taxation, and its legislature is permitted to establish different tax classes in which different property can be valued

differently. Oklahoma's tax classification scheme is similar to those states whose courts have held that legislative tax classification of railroads and airlines, on the one hand, and other entities on the other hand, did not violate the federal equal protection clause. The decision of the Oklahoma Supreme Court is consistent with courts in Kansas, Alabama and Tennessee. The Nebraska decision is based upon application of the provisions of Nebraska law, which are not analogous to the Oklahoma situation. For that reason, petitioners have not shown the court that this case is inconsistent with the Nebraska case.

III. THE DECISION OF THE OKLAHOMA SUPREME COURT DOES NOT CONFLICT WITH EQUAL PROTECTION DECISIONS OF THIS COURT.

When a litigant challenges a governmental classification under the equal protection clause, a court must first determine the appropriate standard of review. Determining the proper standard of review is essential because the level of scrutiny applied often effectively determines whether a challenged classification is upheld. The most deferential standard of review is the rational relationship test. This test is typically used to analyze economic regulations not involving suspect classes or fundamental rights. Under this test, a challenged classification "will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan v. Maryland*, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961). The standard of review under the equal protection clause is especially deferential in the context of classifications

made by complex tax laws. *Nordlinger v. Hahn*, 505 U.S._____, 112 S.Ct._____, 120 L.Ed.2d 1 (1992). Under the rational relationship test, a court will uphold a challenged classification so long as it bears a rational relationship to a governmental objective not prohibited by the Constitution. The Oklahoma Supreme Court found that the legislature was required to recognize the supremacy of federal law, and it responded by creating the railroad and airline subclass. The Oklahoma Supreme Court found that creation of the subclass was neither arbitrary nor irrational and that creation of the class was consistently with the "large leeway" states are given in making classifications and drawing lines which in their judgment produce reasonable systems of taxation. *Lehnhausen v. Lake Shore Auto Parts Company*, 410 U.S. 356, 935 S.Ct. 1001, 35 L.Ed.2d 351, (1973). The Court found that the classification furthered a legitimate state interest by bringing Oklahoma's ad valorem tax scheme into compliance with federal law.

In *Nordlinger v. Hahn*, 505 U.S. ____, 112 S.Ct. 2326, 120 L.Ed.2d 1 (1992), this Court upheld California's constitutional provision requiring an "acquisition value" system of taxation, finding it rationally based.

This Court, in *Allegheny Pittsburgh Coal Company v. County Commission*, 488 U.S. 336 (1989), prohibited the practice of a West Virginia tax assessor of assessing recently purchased property at its purchase price, while making only minor adjustments in the assessments of property that had not recently been sold, in violation of West Virginia's constitutional provision requiring all property to be taxed at a uniform rate statewide according to its current market value. This was not a 4-R or TEFRA case and has nothing to

do with a state's compliance with the provisions of those federal laws.

As a matter of United States constitutional law, states enjoy a wide latitude of discretion in establishing classifications for property tax purposes and, judicial interference is only justified when a classification is unreasonable or arbitrary. In the case at hand, the classification of railroad and airline property, for tax purposes, is more than reasonable. The classification is based upon the special protection afforded property of such entities by federal law, the protection which pipelines over a decade have been trying to secure from Congress. *Appeal of ANR Pipeline Company*, 866 P.2d 1060, 1066-67 (Kan.1994).

Equal protection is not even implicated because equal protection considerations are only implicated when those claiming that their rights have been violated or are similarly situated to those who are treated more favorably. *McDonald v. Board of Election Commissioners of Chicago*, 394 U.S. 802, 98 S.Ct. 1404, 22 L.Ed.2d 739 (1969). In this case, despite the assertions in their petition, petitioners are not similarly situated to airlines and railroads because they do not enjoy special protection from Congress, protection which the states, under the supremacy clause, must recognize. Petitioners urge that to assess their property for ad valorem tax purposes at a rate higher than railroad and airline property, violates the equal protection clause. This position wholly disregards the effect of federal legislation and traditional concepts of tax policy.

CONCLUSION

In 1976, Congress enacted the Railroad Revitalization and Regulatory Reform Act ("4-R"). This Act had as its purpose, the elimination of discriminatory taxation of railroad real and personal property by state and local property tax laws, and to promote the revitalization of the railway system nationwide. *Clinchfield Railroad Company v. Lynch*, 784 F.2d 545, 551 (4th Cir.1986). Airlines are granted similar property tax protection under TEFRA. The Oklahoma Supreme Court was correct wherein it found that there was nothing irrational or arbitrary about Oklahoma classification of airlines and railroads as distinct from public service corporations (including pipelines) because only airlines and railroads have received the special protection afforded by federal law. The Oklahoma Legislature has recognized the effect of federal law and established a classification for taxpayers protected thereby. However, the legislature and State Board of Equalization have not illegally discriminated against petitioners because they are outside the scope of federal protection and are not, therefore, similarly situated to airlines and railroads.

This case is not appropriate for Supreme Court review because the opinion of the Oklahoma Supreme Court is not in conflict with opinions of other appellate courts, nor of opinions of this Court. The equal protection questions raised in petitioner's petition have been disposed of in the Kansas *ANR* case. The Oklahoma Supreme Court made the correct ruling based on Oklahoma law. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1994

ANR PIPELINE COMPANY and
COLORADO INTERSTATE GAS COMPANY,
PETITIONERS,

v.

THE STATE BOARD OF EQUALIZATION
and THE OKLAHOMA TAX COMMISSION,
RESPONDENTS,

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF OKLAHOMA

REPLY BRIEF OF PETITIONERS

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TABLE OF AUTHORITIES

CASES	Page
Allegheny Pittsburgh Coal Co. v. County Comm'n, 488 U.S. 336, 345 (1989)	7
Almeida-Sanchez v. United States, 413 U.S. 266, 272 (1973)	7
Bolling v. Sharpe, 347 U.S. 497, 500 (1954)	7
Burlington Northern R.R. v. City of Superior, 932 F.2d 1185, 1186 (7th Cir. 1991)	4
Davis v. Passman, 544 F.2d 865, 872 (5th Cir. 1977)	7
Department of Revenue of Oregon v. ACF Indus., Inc., 127 L. Ed. 2d 165 (1994)	4
F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)	6
Graham v. Richardson, 403 U.S. 365, 382 (1971)	7
Hooper v. Bernalillo County Assessor, 472 U.S. 612, 618 (1985)	6
Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 359 (1973)(quoting *Allied Stores of Ohio v. Bowers*, 358 U.S. 522, 526-27 (1959))	2
Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)	7
Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869, 882-83 (1985)	5
Mississippi University for Women v. Hogan, 458 U.S. 718, 732 (1982)	7
Nordlinger v. Hahn, 120 L. Ed 2d 1, 13 (1992)	2
Northern Natural Gas Co. v. State Board of Equalization & Assessment, 443 N.W.2d 249 (Neb. 1989), *cert. denied*, 493 U.S. 1078 (1990)	8

CASES	Page
Puerto Rico v. Branstad, 483 U.S. 219, 228 (1987) .	7
Rinaldi v. Yeager, 384 U.S. 305, 308 (1966)	6
Shapiro v. Thompson, 394 U.S. 618, 641 (1969), *overruled in part on other grounds, Edelman v. Jordan*, 415 U.S. 651, 671 (1974)	7
Western & Southern Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 668 (1981)(quoting *Power Mfg. Co. v. Saunders*, 274 U.S. 490, 493-94 (1927))	6
Western Air Lines, Inc. v. Board of Equalization, 480 U.S. 123, 125 (1987)	4
Williams v. Vermont, 472 U.S. 14, 23 (1985)	5, 6
Younger v. Harris, 401 U.S. 37, 52 (1971)	7
STATUTES	
49 U.S.C. § 11503 (1988)	2
49 U.S.C.A. § 40116 (West Supp. 1995)	2
Okla. Const. art. X, § 8	3
Okla. Stat. Ann. tit. 68, § 2802(26) (West 1992) . . .	3
Okla. Stat. Ann. tit. 68, § 2803 (West 1992)	2
Okla. Stat. Ann. tit. 68, § 2808 (West 1992)	3
Okla. Stat. Ann. tit. 68, § 2864(C) (West 1992) . . .	3
U.S. Const. art. VI, cl. 2	7

IN THE

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ANR PIPELINE COMPANY and
COLORADO INTERSTATE GAS COMPANY,
PETITIONERS,

v.

THE STATE BOARD OF EQUALIZATION
and THE OKLAHOMA TAX COMMISSION,
RESPONDENTS,

On Petition for a Writ of Certiorari to the
Supreme Court of the State of Oklahoma

REPLY BRIEF OF PETITIONERS

In the Petition for a Writ of Certiorari, Petitioners demonstrated that the Oklahoma tax officials intentionally and arbitrarily assessed railroad carriers and air carriers at a lower rate than pipelines in violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, in conflict with the decisions of this Court and with the decision of the Nebraska Supreme Court. Both the Oklahoma court and the tax officials point to Congress as the impetus for the discriminatory treatment. Petitioners have shown that this blame is misplaced. Although Congress enacted two anti-discrimination statutes, the state tax officials could have complied with both the federal statutes and the federal constitution. The state tax officials chose to comply only with the federal statutes and ignored the Equal Protection Clause.

Respondents' Brief in Opposition fails to support denial of the Petition for a Writ of Certiorari for the following reasons.

1. The Equal Protection Clause mandates that similarly situated persons must be treated the same absent a rationally based legitimate state interest. *Nordlinger v. Hahn*, 120 L. Ed 2d 1, 13 (1992). Respondents claim that their state interest is compliance with federal statutes. Petitioners do not dispute that compliance with federal statutes may in some circumstances constitute a legitimate state interest. Here, however, the state tax officials chose a method of compliance that is not rationally related to the stated goal of compliance.

Respondents claim that the federal statutes, the 4-R Act[1] and TEFRA,[2] made it unlawful for Oklahoma to continue to classify and tax railroad and airline property as public service corporations property. [Brf. Opp. at p. 6]. This is simply not the case. The federal statutes merely prevent the states from certain tax actions which result in railroad carriers and air carriers being taxed more than commercial and industrial property.[3] The states have large leeway in creating their tax systems, so long as the states do not violate the federal constitution. *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359 (1973)(quoting *Allied Stores of Ohio v. Bowers*, 358 U.S. 522, 526-27 (1959)). Congress and the state legislature left it up to the state tax officials to administer their tax systems fairly and lawfully.

One Oklahoma statute, which has not been expressly amended by the state legislature, classifies property into tax classes, one of which is public service corporations. Okla. Stat. Ann. tit. 68, § 2803 (West 1992). Another Oklahoma statute, which also has not been expressly amended by the state legisla-

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[1] 49 U.S.C. § 11503 (1988).

[2] 49 U.S.C.A. § 40116 (West Supp. 1995).

[3] For relevant text of the 4-R Act and TEFRA, see the Petition at pp. 10-11.

ture, defines the public service corporations class to include air carriers, railroad carriers and pipelines. *Id.* § 2808. Another Oklahoma statute grants the state tax officials the authority to assign assessment ratios for members of the public service corporation classification. *Id.* § 2802(26). The Oklahoma Constitution permits assessment ratios to vary at the discretion of the tax officials between 0% and 35%. Okla. Const. art. X, § 8. Following passage of the 4-R Act and TEFRA, the Oklahoma legislature passed a statute that basically repeated the directives of those federal statutes, prohibiting the state tax officials from choosing assessment ratios for railroad carrier and air carrier property which exceed those chosen for commercial and industrial property.[4]

Despite the language of Section 2864(C), the Oklahoma court interpreted it to create a tax subclass for railroad carrier and air carrier property within the class of public service corporations. Petitioners disagree. Nevertheless, whether or not Section 2864(C) created a subclass, the Equal Protection analysis does not stop there. Even if a subclass was created, Section 2864(C) does not mandate that the state tax officials assign unequal assessment rates between the subclassed public service corporations and the other similarly situated public service corporations. Given their great leeway under Oklahoma law, the state tax officials had two ways of complying with state laws, the federal statutes and the federal constitution. First, the state tax officials could have raised the assessment ratio for local commercial and industrial property to equal the ratio for railroad

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[4] Section 2864(C) provides:

> In determining the assessment ratio for all air carrier property and all railroad property, the State Board shall only consider the ratio of the aggregate assessed value of the fair cash value of the locally assessed commercial/industrial real property of the state.

Okla. Stat. Ann. tit. 68, § 2864(C)(West 1992).

carriers, air carriers, and pipelines. Second, the state tax officials could have lowered the assessment ratio for railroad carriers, air carriers, and pipelines to equal the ratio for local commercial and industrial. Yet the state tax officials chose a third way — lowering ratios for railroads and air carriers but assessing pipelines at a higher ratio. This third way does not comply with the federal constitution. Although it was clearly within their power to assess in a nondiscriminatory manner, the state tax officials chose not to. Thus, it is the actions of the state tax officials that unconstitutionally discriminate. Their choice to assess pipelines differently from railroad carriers and air carriers was not rationally related to the proffered goal of federal compliance because it was not mandated by the federal statutes and because nondiscriminatory methods of compliance were available.

2. Another reason that the disparate treatment by the state tax officials is not a rational means for complying with federal law is because the disparity benefits local commerce at the expense of interstate commerce. Courts have long recognized that railroads' high rates of fixed investment and their immobile assets have left them less able than other interstate enterprises to restrain state taxation by threatening to pull up their stakes and leave. *See Burlington Northern R.R. v. City of Superior*, 932 F.2d 1185, 1186 (7th Cir. 1991). Recognizing the plight of these interstate common carriers, Congress enacted the 4-R Act and TEFRA to protect them from disproportionately heavy state and local tax burdens. *See Department of Revenue of Oregon v. ACF Indus., Inc.*, 127 L. Ed. 2d 165 (1994); *Western Air Lines, Inc. v. Board of Equalization*, 480 U.S. 123, 125 (1987). The 4-R Act and TEFRA plainly require states to readjust their tax arrangements to the extent those arrangements discriminate and create an undue burden on interstate commerce. Congress stated in those statutes that the commercial and industrial class is the comparison class for determining if a state tax is discriminatory

or burdensome. Thus, a state may not treat its local commerce more favorably than interstate commerce.

Petitioners are no different than railroads in that they are common carriers that transport goods for hire in interstate commerce. Like railroads, Petitioners' high rates of fixed investment and their immobile assets subject them to the whim of the state and the taxing officials. The tax officials had nondiscriminatory means for compliance with the federal statutes and state law — they could have raised the assessment ratios for local commerce or lowered the assessment ratios for interstate commerce — but instead, they chose to arbitrarily discriminate against Petitioners and against interstate commerce. This Court has stricken classifications that discriminate against interstate commerce in favor of local commerce as being in violation of the Equal Protection Clause. *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 882-83 (1985)(promotion of domestic business by discriminating against nonresidents is not a legitimate state purpose); *Williams v. Vermont*, 472 U.S. 14, 23 (1985)(discriminatory use tax exemption for in-state purchases does not further legitimate state objective).

3. Respondents attempt to circumvent a proper analysis under the Equal Protection Clause by claiming that pipelines are no longer similarly situated with railroad carriers and air carriers because the state has placed them in a separate tax subclass. Apparently, Respondents believe that simply by creating a tax subclass for railroad carriers and air carriers the state magically destroyed the former similarity among these taxpayers and Petitioners. If this were true, a state could avoid any challenge under the Equal Protection Clause simply by creating statutory subclassifications. Respondent's contention completely undermines equal protection principles.

The Equal Protection Clause focuses on the treatment given to similarly situated taxpayers, whether or not they are placed in the same tax class or subclass. *See, e.g., Rinaldi v.*

Yeager, 384 U.S. 305, 308 (1966)(equal protection requires more of a state law than nondiscriminatory application within the class it establishes); *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920). This Court has routinely stricken classifications that place similarly situated persons in different classes as contrary to the Equal Protection Clause where there is no rationally based legitimate state interest. *See, e.g., Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 618 (1985); *Williams v. Vermont*, 472 U.S. 14 (1985). Respondents offer as their only distinction the existence of federal statutes that, without more, could not operate as the requisite rationally based legitimate state interest.

In order to pass constitutional muster, the subclass must be supported by pre-existing differences. *Western & Southern Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 668 (1981)(quoting *Power Mfg. Co. v. Saunders*, 274 U.S. 490, 493-94 (1927)); *Williams v. Vermont*, 472 U.S. at 27; *F.S. Royster Guano Co.*, 253 U.S. at 415. In this case, it is undisputed that there were no pre-existing differences among railroad carriers, air carriers, and pipelines. The Oklahoma court recognized that absent the federal statutes, pipelines are similarly situated with railroad carriers and air carriers. [Opinion, Pet. App. at p. A-9]. Indeed, Oklahoma has classified and assessed these taxpayers the same because they are alike. The mere existence of a federal statute does not in and of itself excuse trampling on Petitioners' rights to be treated equally under the laws — there must also be relevant pre-existing differences among the taxpayers. A federal statute may not alone constitute the basis for separate classification of similarly situated taxpayers.

Respondents claim that these taxpayers are no longer similarly situated because some have federal "protection" by act of Congress and Petitioners do not. Congressional inaction cannot suffocate constitutional rights. *Davis v. Passman*, 544 F.2d 865,

872 (5th Cir. 1977). When Congress expressly prohibits discrimination against one person but is silent concerning another similarly situated person, such silence does not constitute permission to discriminate against the other person. A federal anti-discrimination statute should not be used by the states to justify further discrimination among taxpayers who are alike. Such bootstrapping eviscerates the Equal Protection Clause and renders it meaningless in the economic context.

First and foremost, the states and their agencies and officials must obey the United States Constitution. *Puerto Rico v. Branstad, 483 U.S. 219, 228 (1987)*; *Allegheny Pittsburgh Coal Co. v. County Comm'n*, 488 U.S. 336, 345 (1989). Under the Supremacy Clause, the United States Constitution is the supreme law of the land. U.S. Const. art. VI, cl. 2. States are required to follow federal law, whether statutory or constitutional, but when a federal statute conflicts with the federal constitution, the constitution prevails. *Younger v. Harris*, 401 U.S. 37, 52 (1971); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). Congress is subject to equal protection parameters pursuant to the Due Process Clause of the Fifth Amendment. *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954). Thus, Congress cannot override the Equal Protection Clause and may not authorize states to violate the Constitution. *Almeida-Sanchez v. United States*, 413 U.S. 266, 272 (1973); *Shapiro v. Thompson*, 394 U.S. 618, 641 (1969), *overruled in part on other grounds*, *Edelman v. Jordan*, 415 U.S. 651, 671 (1974). Neither Congress nor a state can validate a law that denies the rights guaranteed by the Fourteenth Amendment. *Mississippi University for Women v. Hogan*, 458 U.S. 718, 732 (1982), *Graham v. Richardson*, 403 U.S. 365, 382 (1971). States may not hide behind a federal statute when confronted with the Equal Protection Clause.

5. Respondents attempted to brush aside the conflict between the Oklahoma Supreme Court and the Nebraska Supreme

Court's decision in *Northern Natural Gas Co. v. State Board of Equalization & Assessment*, 443 N.W.2d 249 (Neb. 1989), *cert. denied*, 493 U.S. 1078 (1990). Respondents attempted to distinguish *Northern* by arguing that Nebraska places railroad carriers and pipelines in the same class, in contrast to Oklahoma, which has created a separate subclass for railroad carriers and pipelines by enacting Section 2864(C). [Brf. Opp. at p. 8-9]. Even if the Oklahoma court was correct in finding that Section 2864(C) created a tax subclass, the existence of a formal classification system is the beginning rather than the end of the Equal Protection analysis.

In *Northern*, railroads had the 4-R Act as "federal protection" and pipelines did not. Despite the "federal protection" given to railroads, the Nebraska court held that railroads and pipelines are similarly situated, and therefore, must receive the same tax treatment under the Equal Protection Clause. 443 N.W.2d at 256.[5] Respondents and the Oklahoma court ignored this similarity, focusing instead on the subclassification. The differences in the classification systems of Nebraska and Oklahoma are not relevant to the federal Equal Protection analysis. Respondents were required to comply with federal laws before enactment of Section 2864(C) and Respondents are required to comply with federal laws after enactment of Section 2864(C). Nothing has changed. The state must still treat similarly situated taxpayers the same despite any arbitrary classifications it makes.

The *Northern* court required the state tax officials to comply with both the federal statute and the federal constitution — the Oklahoma court did not. There is a direct conflict between the supreme courts of Nebraska and Oklahoma.

6. Finally, Respondents claim that Petitioners are trying to extend the scope of the 4-R Act and TEFRA to include them. Petitioners, however, are instead trying to enforce their rights

[5] Ironically, railroads are far more similar to pipelines than they are to commercial and industrial property.

under the Equal Protection Clause. These rights are independent of any Congressional action or inaction.

CONCLUSION

For the foregoing reasons, and those stated in the Petition, the Petition for a Writ of Certiorari should be granted.

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